

TEXAS BAR EXAM SUBJECT MATTER SUMMARY

Constitutional Law.

Organization and relationship of state and federal courts in a federal system.

- (1) Congress has the power to create lower federal courts
- (2) Federal Courts have jurisdiction, only if the Constitution clearly grants it;
- (3) Federal court has the final judge of its own powers.

State courts are created by the Constitution, and the laws of each state.

Each state has a court of last resort, often referred to as a Supreme Court.

Some states have intermediate courts, underneath which are the state trial courts.

The states have a very large group whereas the federal courts are limited only to those powers explicitly listed to them in the Constitution. It's also important to note that only certain cases are eligible for Supreme Court review.

Jurisdiction

the United States Constitution gives the federal courts jurisdiction over all cases which arise under the Constitution, Laws, and Treaties of the United States, and Congress has the power to define and limit the jurisdiction of all courts, this includes the United States Supreme Court.

It is important to note that Congress generally cannot take away a state's 11th Amendment immunity from the states.

This is only possible in cases involving section 5 of the 14th Amendment which can apply to the state governments for violations of equal protection and Due process.

Also if the state officer is not paying out of the state treasury he can be sued in his individual capacity in federal court.

Furthermore, the Federal Government can sue a state without it's consent.

However, generally, The 11th amendment prohibits the federal courts from hearing damage claims against a state without their consent.

Judicial review in Operation.

In the practice of law, there is a case or controversy requirement. That is to say, that there must be an actual dispute between the parties before a court can even hear the case.

In accordance with this notion, the case or controversy requirement in the Constitution prohibits the federal courts from issuing advisory opinions.

Furthermore, it results in a standing requirement, meaning that a plaintiff must show that he has been injured, or will be injured, either: (1) Economically; (2) Aesthetically; or, (3) Environmentally.

That means that the plaintiff must have a real injury and can only bring a case for an injury for which he has personally suffered.

If the plaintiff seeks an injunctive or declaratory relief, then the plaintiff must show the likelihood of future harm, and the relief sought must eliminate the harm alleged.

When a question on the bar exam inquires which plaintiff has the best standing, look for the answer which indicates the one who has personally suffered an injury. If there are multiple plaintiffs whom have suffered an injury, then look for the one to whom the injury was monetary for the best standing.

In general, a plaintiff cannot assert claims of others who are not before the court unless the following holds true: (1) A close relationship between the plaintiff and the third party; (2) The third party is not likely to assert his own rights; or, (3) The plaintiff is the organization and the organization is suing on behalf of its members, whose cause is germane to the purpose of the organization, and they have standing in their own right, but need not participate in their individual accord.

An example of a case where the third party would not likely to assert his own right is when a criminal has standing to raise rights of the jury to be free from discrimination. This is

usually because the jury will not bring this claim on his own as he does have the knowledge or the ability to raise this claim on his own; thus a defendant in a criminal case has the right to bring it on his behalf.

It is important to remember that, generally there are no generalized complaints allowed, which is to say that a plaintiff cannot sue solely as a citizen or as a taxpayer.

Thus, for example, a taxpayer lacks standing to challenge grants of property by the government to religious institutions. On the other hand, that very same taxpayer, will have standing to challenge government expenditures as being violative of the Establishment Clause, because in that case it is not too generalized, and is fairly traceable.

Now that we have fulfilled the standing requirement, it is important to recall that in order to have a valid case, we need to examine the ripeness of the case.

In order to fulfill this ripeness requirement, there must be a genuine immediate threat of harm. To measure this, consider the harshness that will result without pre-enforcement review AND the fitness of the issues and record for judicial review.

On the Bar Exam if the fact pattern has someone requesting a declaratory judgment, then that tips you that a ripeness question is probably involved.

Next comes the mootness requirement. If a case is filed, and then some subsequent happens causing the plaintiff's injury to end, then the case is said to be moot and must be dismissed, unless it is within one of three applicable exceptions: (1) Where injury is capable of repetition yet evading review; (2) Voluntary cessation; and (3) Class action suits"

With respect to the first, capable of repetition yet evading review, then the case isn't dismissed even if it has become moot. For example *Roe v. Wade*, even when the pregnancy is over, the plaintiff is capable of getting pregnant again, and thus the case dealing with abortion still affects her.

With respect to the second exception, voluntary cessation; this happens when the defendant stops the offensive practice, but is free to resume it at any time.

In regards to the third exception, class action suits; this refers to the situation where the named plaintiff's case is moot, but at least one member of the class still has an injury, then the case does not have to be dismissed.

Therefore, in a nutshell, to bring a case before the courts you need to have: (1) Standing; (2) Case must be ripe; and (3) It cannot be moot.

Now comes the adequate and independent state ground doctrine. This doctrine governs the power of the United States Supreme Court to review judgments entered by the courts of the several states. In general, if the law is a federal law, then the United States Supreme Court has jurisdiction to review the state court judgement, if it is state law, then it does not.

In situations where it is a mix of federal and state law, then the federal court must look at the grounds and determine whether the state ground is adequate to support the judgment, and is independent from federal law. If it is both adequate to support, and independent from federal law, then the Supreme Court lacks the jurisdiction to review the case.

Adequate to support the judgment happens where the state procedural rule is presumed to be adequate unless: (1) it is arbitrary; (2) Unforeseen; or, (3) Unreasonable.

With respect to the requirement that the decision be independent of federal law, if it is not apparent from the four corners of the opinion that the judgment rests on an independent state law, then, unless it is necessary or desirable to obtain clarification from the state court itself, the Supreme Court will presume that the decision rested in part on federal law, thereby rendering it reviewable.

All cases from state courts will go up to the Supreme Court pursuant to a writ of certiorari, and the federal courts may only hear cases from state courts after there has been a final judgment from the highest state courts.

There are instances where a federal court will decline a case based on the theory that the case is a political question.

The Constitutional violations which the federal courts will not hear include: (1) A republican form of government clause challenge; (2) Challenges to the President's conduct of foreign

policy and affairs, this includes the rescinding of a treaty; and, (3) Challenges to the impeachment and removal process.

It should also be noted, that where the United States waives its sovereign immunity, such as when it established the Federal Torts Claim Act, in such cases, the political question doctrine will not apply.

Now comes the separation of powers. First we will examine the separation of the federal branches of government.

First, the powers of Congress. Congress has the commerce power, which is to say that it can regulate the channels of interstate commerce.

Interstate commerce includes: (1) Instrumentalities of interstate commerce, such as trucks and planes; and, (2) economic activities that have a substantial economic effect on interstate commerce, this includes both: (a) domestic commerce; and (b) foreign commerce.

However, Congress does not have the power to regulate a non-economic activity. For example, mere possession of a firearm in a school zone does not affect interstate commerce; and the keeping of a wild animal does not have a substantial economic effect.

Now we consider the limitation that the 10th Amendment places on Congressional power to compel state regulatory or legislative action. The 10th Amendment essentially states that the federal government must trace its power back to the Constitution, and any power that is not given to the federal government is reserved to the states. That being said, the interpretation of federal power is extremely liberal, and therefore there are hardly any powers which are exclusively reserved to the state.

For instance, Congress can induce state governments to act by putting strings on funds and prohibiting harmful economic activity by the state.

Furthermore, Congress has the Taxing and Spending power. This is an exclusive power of Congress but it is still subject to review by the federal courts.

If, on the bar exam, you see "Appropriation", then you know to look for the taxing and spending power.

Additionally, Congress can spend in any way it believes will serve the general welfare. This is from the general welfare clause. However, it should be noted, that this is not an independent source of congressional power. Therefore, if it is standing alone, it is a wrong answer. Typically, the answer will only be correct when the general welfare clause is dealing with the taxing and spending power, or the federal police power.

Unlike the states, however, The federal government does not have a general police power. Which is to say that it cannot pass laws for the benefit of the health, safety, well-being, or morality of its citizens. But, the Congress does have such a power over federal territories such as Washington D.C. and Military bases.

Congress also has the so-called war powers. This is the power to declare war, and the authority to remedy economic problems which directly and substantially flow from the war. Thus Congress has: (1) The defense power, or the power to declare war; (2) To raise and maintain the armed forces; and, (3) The power to make rules and regulations for the military.

Furthermore, Congress also has a foreign affair power. While it is the president who has the power to negotiate treaties, the Senate must ratify said treaties. Therefore Congress also has foreign affairs power.

Congress has the power of enforcing the 13th, 14th, and 15th Amendments. Remember that: (1) 13th Amendment prohibits involuntary servitude; (2) 14th Amendment guarantees equal protection and due process for all citizens; and, (3) 15th Amendment bans race-based voting.

Congress also has other powers including: (1) The power to coin money and regulate its value; (2) The power to establish post offices and railroads; and, (3) The property power.

With respect to the property power; this includes: (1) The power to issue patents and copyrights; (2) Power to dispose of the territory or other property belonging to the United States like: (a) The District of Columbia; (b) Wild animals on Federal Property; (c) Military ships and aircraft; (d) Federal Buildings, Enclaves, and Indian Reservations.

Now comes the Necessary and Proper Clause. The Necessary and Proper clause allows Congress to use any means which are not prohibited by the Constitution in order to carry out congressional powers. Note, that on the bar exam, this is not an

independent source of congressional power, and therefore where standing alone, it is indicative of a wrong answer. The Necessary and Proper Clause will only be the correct answer if it carries with it some other enumerated power.

Congress has some power to regulate the courts as well. However, Article 3 provides that there can be only one United States Supreme Court, and the congress cannot divide that court.

However, with regard to the lower federal courts, such as the Courts of Appeal or District Courts the Congress can: (1) Confer Jurisdiction; (2) Remove Jurisdiction; or, (3) Limit Jurisdiction for the lower federal courts.

It is very important to remember that Congress CANNOT: (1) Create new rights; or (2) Expand the scope of existing rights.

Rather Congress can only: (1) Prevent violations of existing rights; or, (2) Remedy violations of existing rights.

Now comes the powers of the President of the United States, or the Chief Executive of the United States.

The "Take Care" Clause states that the President shall take care to ensure that the laws of the United States shall be faithfully executed. Many have also asserted that the President's responsibility in the "faithful" execution of the laws authorizes him to suspend the privilege of the writ of Habeas Corpus if it is deemed necessary, and upon Congressional Approval.

It is also worth noting that the Judiciary may not restrain the President in the Execution of the Laws.

The President of the United States is also the Commander in Chief. This is to say that the President is the highest ranking officer in the military.

For treaty and foreign affairs powers, the President may negotiate treaties, but two-thirds of the Senate must approve it.

However, in regards to executive agreements, there is no Senate Approval required. Remember that an Executive Agreement is an Agreement between the United States and a foreign government. Executive Agreements may be used for any purpose to which a treaty may be used, and where there is conflicting state laws

the Executive Agreement would prevail over them just as a treaty would.

However, if an Executive Agreement conflicts with federal law then it is invalid. In the case of a treaty, where it conflicts with federal law, the latest in time prevails, and neither an Executive Agreement, nor a treaty may be inconsistent with the Constitution. This is because, pursuant to Article 6 of the Constitution, The Constitution itself is the Supreme Law of the Land.

With respect to our troops, the President has broad power to use American Troops in foreign countries. On the bar exam, if the question deals with whether the President has the power to send troops to foreign countries, the President ALWAYS has the power either because of: (1) The political question doctrine applies, so that the court cannot review it; or, (2) Due to the broad emergency powers of the President.

Thus the President has broad emergency powers, but such powers are not absolute. Furthermore the president has the power over the Appointment and removal of officials.

In regards to the appointment power. The President may with Senate consent, appoint the following: (1) Ambassadors and Consuls; (2) Federal Court Judges; and, (3) Officers of the United States such as a member of an agency or commission having administrative or enforcement powers.

With regard to the power to appoint inferior officers, Congress can give this power to the President, heads of departments or lower federal courts.

On the other hand, Congress Cannot give itself or its officers the power of appointment.

With respect to the removal power, the President may fire any executive branch official, Unless it is a lower office which may be limited by statute. Statute can limit removal only for a good cause if the office being limited is one where it's independence of the president is desirable.

Federal Inter-branch Relationships

We will first look at the Congressional limits on the executive. The most common Congressional limits on the executive are: (1) Impeachment; and, (2) Removal.

Impeachment is the first of two stages in the specific process for a legislative body to remove a government official without said official's agreement. This is then followed by the second stage which is removal or conviction.

The following officers are subject to the impeachment and removal process: (1) The President; (2) The Vice-President; (3) Federal Judges, including Supreme Court Justices; and (4) Officers of the United States.

The grounds for impeachment of the aforementioned officers are: (1) Treason; (2) Bribery; or (3) High Crimes and Misdemeanors.

It is critical that you remember that impeachment does not remove a person from office, and a person can only be removed if the Senate Convicts.

Thus: (1) Impeachment by the house of representatives only requires a simple majority vote; and, (2) Removal or Conviction by the Senate requires a two-thirds super majority vote.

Remember that while a treaty supersedes prior inconsistent federal statutes, an executive agreement does not. Congress may, by statute, limit the presidential power to make executive agreements. Also, remember, that Congress, not the president, has the power to declare war.

Executive appointees can be removed at the president's discretion, even when the Senate's consent was required for the original appointment of the officer.

However, when officers are appointed pursuant to an act that specifies the length of their term of office, then they can be removed by the president only for cause.

The Presidential requirement to veto, or pass, or withhold action for bills. In order to properly act, Congress needs: (1) Bicameralism; AND, (2) A passage by both the House and Senate; and, (3) to present the bill to the president either to sign the bill into law or to veto the bill.

It is unconstitutional for the legislature to have legislative vetoes which seek to overturn an executive action without bicameralism and presentment. It is also violative of the Constitution to have Line-item vetoes, which is where the

president wants to veto only a part of a bill. A state Governor may have a line-item veto, but a president may not.

Now comes the Non-delegation Doctrine. This doctrine states that Congress CANNOT delegate executive power to itself, or to its officers.

Congress may give away its own powers, yet it cannot take away powers from other branches of government. Still, there is no limit on the ability of Congress to delegate to the executive and judiciary branches its own powers. Therefore, on the bar exam it is usually a wrong answer, if it says that Congress has EXCEEDED its power to delegate.

Now we come to the most tested Executive, Legislative, and Judicial Immunities.

The president has absolute immunity to civil suits for money damages for ANY actions WHILE in office BUT NOT for actions which occurred prior to taking office. Furthermore, the president has executive privilege for presidential papers and conversations, unless there is an important governmental interest.

The pardon power for Federal crimes is also granted to the President by the Constitution. This means that the president has the power to grant pardons or reprieves for federal crimes. Note that the pardon power only applies to federal crimes, and not to state crimes, and it only applies to criminal liability. Therefore it will not be correct for a President to pardon a civil liability. Finally the President may not pardon someone who has been impeached by the House.

The House members are protected from civil suits for Slander and Libel suits involving statements made while on the floor of the Congress, but may remain liable for reprinted statements. This is discussed further in the Torts outline.

Now comes the relations of Nation and States in a Federal System

Intergovernmental Immunities

In our system of Government, States have immunities from the federal government, and in some cases, the Federal government has immunity from state law. This concept is called intergovernmental immunities.

We'll start with the Federal Immunity from State Law. States cannot: (1) Tax; or, (2) Regulate the federal government's activity. Thus, it is against public policy and is unconstitutional to pay state tax out of the federal treasury. Consequently: (1) Private stores on federal land can be ordered to pay state tax; but, (2) Military stores on military bases cannot be ordered to pay state taxes.

Furthermore states cannot force the federal government to comply with state pollution laws.

Now comes the State Immunity from Federal Law. According to the Tenth Amendment, the federal government has the power to regulate only those matters which are specifically delegated to them by the United States Constitution. Those which are not delegated to them are reserved to the states. But as was stated earlier, this has little meaning today, because the federal powers are given an expansive effect, thus there are very few powers which are reserved solely to the states.

That being said, The Supreme Court Cannot sue state official if it is the state treasury who will be paying retroactive damages for the past harm, unless it is a violation of Equal Protection or Due Process then per section 5 of the Fourteenth Amendment such a case may be brought even if it is payed out of the state coffers.

The doctrine of abstention prohibits a federal court from deciding constitutional issues which are premised upon unsettled questions of state law, and upon which the determination of the action would depend.

Now comes Federal based limits on the State's Authority.

First up is negative implications of the Commerce Clause, or as it is more commonly referred to "the dormant commerce clause".

The dormant commerce clause prohibits a state from passing legislation which improperly burdens or discriminates against interstate commerce or out-of-state citizens. If the law in question does not discriminate against out-of-state citizens, then it is unconstitutional if it places an UNDUE burden, which means the burden exceeds the benefits, on interstate commerce.

If, on the other hand, the law in question does discriminate against out-of-state citizens, then it is unconstitutional if it

places a burden on interstate commerce UNLESS it is necessary to achieve an important governmental purpose.

Therefore, a law which discriminates against out-of-state citizens will still be valid if: (1) Congress approves of the discrimination; (2) Congress passes a federal statute which is similar to the state statute; (3) Congress itself is a market participant; and, (4) When a public college charges less to in-state residents for tuition.

Now comes a rarely tested topic: State Taxation of Interstate Commerce.

States cannot use their tax system to help in-state businesses such as Tax credits for purchasing products within that state. A state can only tax activities if there is a substantial nexus to the state. And State taxation of interstate business must be fairly apportioned.

Now comes Supremacy Clause and Preemption. Article 6 of the United States Constitution states that the Constitution, Federal Laws, and Treaties are the supreme law of the land.

Thus, if a federal statute states that federal law wholly occupies a field, then the state law is Expressly preempted. If, on the other hand, the statute does not expressly state such, the federal law will preempt state law if the Federal and State Laws are mutually exclusive. This arises when a person cannot comply with both laws at the same time because they are polar opposites.

For example, States may set environmental standards that are stricter than federal law, unless Congress prohibits it. And this usually happens if the state law obstructs, or gets in the way of achievement of a federal objective, or if Congress demonstrates a clear intent to preempt state law.

Another limit that states have to abide by is the Full Faith and Credit Clause. Under this doctrine, the Court in one state must give full faith and credit to judgments of sister courts in another state which rendered the judgment if that court: (1) had jurisdiction over the parties and subject matter; and (2) the judgment was on its merits; and (3) The judgment is final.

Finally, when Congress chooses to do so, state actions which Congress plainly authorizes are invulnerable to Constitutional attack under the Commerce Clause.

Now we will examine a very important topic on the Exam:
Individual Rights.

State Action.

Typically Individual rights are being protected against a state action. State action is where the state is trying to implement some rule which may interfere with the United States Constitution.

For Bar Exam purposes, Constitutional questions only apply to actions by a government, and do not apply to actions by private individuals or businesses. However, There are exceptions to this rule: (1) Public Function Exception; (2) Entanglement Exceptions

With respect to the Public Function Exception, The Constitution applies if a private entity is performing a task which is: (1) Traditionally; and (2) Exclusively done by the government (such as holding elections).

The Entanglement Exception refers to Constitutional applicability if the government authorizes an unconstitutional act.

Courts cannot enforce racially restrictive covenants, and the Constitution applies under the entanglement exception when: (1) The government leases premises to a restaurant that racially discriminates; (2) The state provides books to schools which racially discriminate; and, (3) A private entity regulates interscholastic sports within a state.

However, the entanglement exception does not apply when: (1) a private school that is over 99% funded by governmental expenditures fires a teacher because of his speech; (2) When the National Collegiate Athletic Association, which is a private organization, orders the suspension of a coach at a state university; or, (3) A private club, with a liquor license from the state racially discriminates.

While there may be governmental involvement with the organization, it does not authorize the unconstitutional acts in these incidents; and with respect to the first incident the state action was funding, not firing, thus there is no entanglement exception.

Now comes the Bill of Rights. The Bill of Rights in the Constitution will apply directly to the federal government, and will apply by incorporation to the state and local governments. However, there are some notable rights which do not apply to the states, and therefore the states can change the following Bill of Rights: (1) up until recently the Right to Bear Arms, however, recent case law to the United States Supreme Court now incorporate the second amendment; (2) Right to not have a soldier quartered in a person's home (third amendment); (3) Right to a grand jury indictment in criminal cases; (4) Right to jury trial in civil cases; and (5) Right against excessive fines.

For the Bar exam you must familiarize yourself with 3 levels of scrutiny.

For highly private, personal affairs or issues, the Constitution provides a higher level of scrutiny to prevent governmental encroachment of individual rights.

On the other hand, for less personal issues like economic matters, the Constitution provides a lower level of scrutiny.

The highest level of scrutiny is the Strict Scrutiny standard. Under this standard, a law is only constitutional if it is necessary to achieve a compelling governmental purpose. The government has the burden of showing that there is no less restrictive alternatives available for the law in question.

The second level of scrutiny is intermediate scrutiny. This test states that a law is constitutional only if it substantially relates to an important governmental interest. In these cases the government has the burden to show that the law in question is narrowly tailored. That being said, it does not have to be the least restrictive means to what the law is attempting to achieve.

The last level of scrutiny is the Rational Basis Test. Rational Basis states that a law is Constitutional if it is rationally related to a legitimate governmental purpose. Thus the burden is on the challenger to show that the law in question is arbitrary or capricious.

On the exam, a law will be presented to you, and you must determine the level of scrutiny applicable and then determine pursuant to that level of scrutiny determine if the law is constitutional.

So remember the levels: (1) Strict Scrutiny; (2) Intermediate Scrutiny; and (3) Rational Basis.

Now comes Due Process. Due Process is divided into substantive and procedural Due Process.

Substantive due process should be analyzed when the law in question affects All people, as opposed to equal protection which is analyzed when a law affects only some people.

Under Substantive Due Process, rights are divided into fundamental rights and all other rights.

Fundamental rights are in relation to private matters and the level of scrutiny is strict scrutiny.

Fundamental Rights include: (1) The right to marry; (2) The right to procreate (that is sterilization laws are typically violative of the Constitution); (3) Right to custody of one's children; (4) Right to keep family together, this includes relatives; (5) Right to control the upbringing of one's children such as choosing a school. In this case, courts cannot order grandparent visitation if the parent objects to such; (6) Right to purchase and use contraceptives.

Other rights are also protected, however, strict scrutiny may not apply. For instance, the right to abortion does not apply strict scrutiny. Rather the undue burden test is applied.

Before viability, states Cannot prohibit abortion, but states can regulate abortions as long as they do not create an undue burden on the woman's ability to obtain an abortion.

Thus the following situations will occur thusly: (1) 24-hour waiting period is not an undue burden on the woman's right to abortion; (2) Requirement that abortions be performed by licensed physicians is not an undue burden; (3) Prohibiting partial birth abortions is an undue burden.

After viability, states can prohibit abortions Unless it is necessary to protect the woman's life, or overall health.

The government does not have to pay for abortion or provide abortions in public hospitals. Furthermore, spousal consent and notification laws are unconstitutional. On the other hand, a state can require parental notice or consent for an unmarried minor's abortion as long as there are alternative procedures

where the minor can get an abortion by going before a judge who can approve the abortion upon a finding that it is in the minor's best interest, or that the minor is mature enough to decide the issue for her self.

Other rights include: (1) the right to engage in private homosexual activity; and, (2) the right to refuse medical treatment.

With respect to the right to refuse medical treatment. A competent adult, may refuse such treatment, even when it is life-saving treatment. The states may require clear and convincing evidence that the person desired termination of treatment. Furthermore, states may prevent family members from terminating treatment for another. However, there is no right to physician-assisted suicide.

In regards to Economic rights, these rights only apply rational basis. Therefore: (1) Right to property; (2) right to contract; and, (3) Right to business are usually controlled by the Rational Basis test.

Procedural due process derives from the notion that the Constitution requires a notice and a hearing when there has been a deprivation of life, liberty or property.

Generally, to be subject to personal jurisdiction, a defendant that was not personally served with process within the state must have a sufficient level of personal or business contacts with the state where the court sits such that the defendant could reasonable expect to be sued there.

With respect to deprivation, Government negligence is insufficient for deprivation. Deprivation must be: (1) intentional; or, (2) reckless conduct.

Furthermore, if there is an emergency, it is not a deprivation unless the conduct shocks the conscience.

For instance, if a Police car was chasing a suspect and the car recklessly ran a boy over, there would not be a deprivation of life without due process here because: (1) it was an emergency; (2) the emergency was reasonable; and, (3) The emergency does not shock the conscience.

In regards to the deprivation of Liberty, it is in reference to when the loss of freedom is a significant loss. thus, basically,

notice and a hearing are required before an adult can be institutionalized unless there is an emergency. In comparison when a parent institutionalizes his child, there only needs to be a screening by a neutral fact-finder.

Additionally, Harm to reputation by itself is not a loss of liberty, and in order to have standing, there has to be an economic loss in connection with the harm to reputation.

Note that on the exam, prisoners are rarely deemed to have suffered a loss of liberty, they usually lose this battle.

Deprivation of property occurs when there is an entitlement and that entitlement is unfulfilled. The examiners no longer use "rights and Privileges" Language, so the answer is wrong when it says right and privileges for a deprivation question. Rather, the proper term is entitled or entitlement.

An example of a deprivation of property is where the federal government grants a person a job for 1 year, and then fires that person during the middle of the year. In this case there must be a notice and hearing or else the procedural due process clause is violated.

Note however, that a government's failure to protect people from privately inflicted harms will only be a denial of Due Process if it was the government that created the danger in the first place.

The procedures required when deprivation occurs is the application of a balancing test which balances the following factors: (1) the importance of the interest to the individual; (2) The ability of additional procedures to increase the accuracy of the decisions; and (3) Governmental interest in administrative efficiency (or the cost to the government).

Some examples include notice and a hearing: (1) Before welfare benefits can be terminated, notice and a hearing is required; (2) Before parental rights can be terminated, notice and a hearing is required; (3) When social security benefits are terminated, a hearing is required after the benefits are terminated; (4) An instruction to the jury and judicial review is required when a verdict includes Punitive damages; (5) Grossly excessive punitive damages are usually violative of due process; and, (6) Prejudgment attachment or governmental seizure of assets must be preceded by notice and a hearing Except under some very unique circumstances.

Equal protection

The Equal protection clause of the 14th Amendment applies only to state and local governments. It is applied to the federal government pursuant to the Due Process Clause of the 5th Amendment.

Different tests will apply to different rights.

With fundamental rights strict scrutiny is applied.¹ The first fundamental right is the right to interstate traveling.

Thus, laws which prevent people from traveling from state-to-state will be tested under strict scrutiny. note however, that international travel is not protected.

A durational residence requirement is tested under strict scrutiny, and 50-day residential requirements are the maximum number of days which is allotted for voting criteria.

The second fundamental right is the right to vote. thus laws denying one the right to vote will be examined under Strict Scrutiny.

Examples of prohibited interferences with the right to vote are: (1) Poll Taxes; (2) Property ownership requirement for voting; (3) Switching party affiliation prohibits voting; (4) Racially motivated gerrymandering; and, (5) reapportionment, where on-person-one vote is required, even if all voters approve of deviation from the one-person-one-vote standard, this is disallowed.

On the other hand, At-large elections are constitutional unless there is proof of discriminatory purpose.

Also, counting uncounted votes without pre-existing standards in a presidential election is unconstitutional. Furthermore, age requirements for candidates is only looked to under rational basis.

Now comes Classification, which will subject the court to higher levels of scrutiny.

Suspect classes will receive strict scrutiny. Suspect Classes include: (1) Race; (2) national Origin.

Under racial classification, the law can be discriminatory on its face or neutral. If the law is facially neutral, then the challenger has to prove that the racial classification was present by demonstrating: (1) discriminatory impact; and, (2) discriminatory intent.

If the challenger fails to show one of those elements, then the law will be reviewed under the rational basis test.

When a racial classification benefits minorities, the law can stand if it has numerical set-asides or quotas for past discrimination. Schools can use race as a factor in admission decisions to help minorities, but it cannot add points to applications based on race.

Furthermore, seniority systems cannot be disrupted for affirmative action.

Now with respect to Alienage, discrimination against non-U.S. citizens will be tested under strict scrutiny except when Alienage classifications concerning self government or democratic process such as: (1) Voting, Serving on a jury; (3) Becoming a police officer; (4) Becoming a public-school teacher; or, (5) Becoming a probation officer. In such cases the rational basis test will apply.

Also the Rational basis test will be applied where, Congress discriminates against aliens pursuant to immigration laws. This is because immigration is a plenary power of the United States Congress.

now we move to Intermediate scrutiny. this applies to: (1) gender cases; and (2) no-marital children.

Gender discrimination will be allowed if there is an exceedingly persuasive justification.

Gender classification can be on its face or neutral. If the law is facially neutral, then the challenger has to prove Gender classification by showing: (1) discriminatory impact; and, (2) discriminatory intent. Just as in race, if only one of the factors can be shown, then you will apply the rational basis test.

For gender classification benefiting women, those laws based on old role stereotypes are disallowed. for instance, Awarding a woman alimony, but not a man is not allowed. Furthermore,

providing Survivor benefits to women, but not to men unless they show that they were economically dependent is disallowed.

On the other hand, those laws designed to remedy past discrimination and differences in opportunity are allowed. for instance, Social Security formulas which benefit women are allowed.

Laws which discriminate against non-marital children also fall under the intermediate scrutiny test.

thus a law which denies a benefit to all non-marital children but gives the benefit to all marital children will be unconstitutional.

Laws which allow only marital children to inherit from their fathers is also unconstitutional.

Note, however that laws which deny a benefit to some non-marital children are acceptable. for instance, a law that states that non-marital children can inherit from their father only if there is a paternity test before the father dies will be deemed constitutional. furthermore, illegal alien children should have a right to public education.

Finally rational basis review will be applied to: (1) Age discrimination; (2) Disability discrimination; (3) Wealth discrimination; (4) Economic regulations; (5) Sexual orientation discrimination; and, (6) All other discrimination.

Now comes the takings clause.

The government may take private property for public use if it provides just compensation.

Before we proceed any further, What is a taking? A taking can be broken down into: (1) Possessory taking; and (2) regulatory taking.

A possessory taking is when the government confiscates or physically occupies the property. note that the size of the property is irrelevant.

A regulatory taking, on the other hand, is when the government regulation leaves no reasonable economically viable use in the person's property.

Thus, if after the government regulation, a land is rendered valueless, then it constitutes a taking. however, if the value of the property merely decreases, then it is not a taking.

If the government places conditions on the owner's ability to develop the property it will be a taking, unless the benefit is roughly proportional to the burden imposed.

A person can bring a takings challenge even if the regulations were in existence at the time the owner bought the property, and even if the owner was aware of the restrictions before he acquired the property.

Temporarily denying an owner the use of his property will not be a taking if the government's action is reasonable. For example, if the land were to be made for public use.

Public use is broadly defined, and covers any use that the government reasonably believes will benefit the public.

If the land is not for public use, then the government must give the property back.

if there is a taking, then the government has to give the property owner just compensation for the land that was taken.

Just compensation is measured in terms of loss to the owner, and not gain to the government. That in turn, means that if the government takes the property for which the Fair Market Value was \$100,000, that amount would be the loss to the owner. But if the government will gain \$1 million from the property, the government still only has to pay the \$100,000 to fulfill the just compensation requirement.

Other protections.

The other protections for individuals include the Privileges and Immunities clause,s, which applies ONLY if the law in question discriminates against out-of-state citizens. note that corporations and aliens cannot sue the government under the Privileges and immunities Clause.

However, the law in question will be deemed unconstitutional if it discriminates against individuals with regard to Civil Liberties or important economic activities such as the ability to earn a livelihood Unless it is necessary to achieve an important governmental purpose.

The contracts clause applies only to state or local interference with existing contracts. thus it does not apply to federal government interference with contracts, or future contracts.

State or local interference with private contracts must meet intermediate scrutiny. On the other hand, stater or local interference with governmental contracts must meet strict scrutiny.

Note that on the exam, If there is an Ex Post Facto Clause question, it is usually a wrong answer when dealing with contracts.

Unconstitutional conditions prevent a state from imposing a condition that is unrelated to the purpose to be furthered.

If the government places conditions on the use or regulation of an owner's property on the receipt of a public benefit, then the government must compensate the owner unless: (1) There is an essential nexus between the legitimate state interest and the condition; and, (2) the nature and extent of the condition are roughly proportional to the harm prevented by the regulation. So, for instance, a state may not refuse to pay unemployment benefits to a seventh Da Adventist who rejects a job that requires him to work on Saturdays.

Bills of attainder, which are legislative punishments of a named individual without judicial trials, is usually unconstitutional.

Ex post fact laws are generally unconstitutional. there are three ways in which to make a law ex post facto: (1) A law criminalizes an action that was legal at the time it was committed; (2) a law increases the punishment for a crime retroactively; and, (3) a law changes the procedure for a conviction such as evidence required.

Ex post fact law doctrine applies to both state and federal governmental actions.

now we come to first Amendment rights.

The first is the freedom of religion and separation of church and state.

Under the Free Exercise Clause, a person cannot use this provision to challenge a neutral law of general applicability

and has to show that it is specifically targeting religion. for instance, an Indian tribe once sued over the law prohibiting the use and sale of marijuana, stating that it was part of their religion. The Court responded that the Free Exercise Clause cannot be used in this case, because the law in question was not targeting religion, it was targeting everyone.

furthermore, the Government cannot deny benefits to individuals who quit their jobs for religious reasons.

Under the Establishment Clause, Government cannot endorse religion or endorse a particular religion. Thus in order to not violate the Establishment Clause, the law must have: (1) A secular purpose which is the primary purpose; (2) An effect that neither advances nor inhibits religion; and, (3) no excessive entanglement with religion.

Thus, for example, a government cannot pay salary of religious schools, yet members of the clergy can hold public office.

Note that religious symbols on governmental property is allowed if the following conditions are satisfied: (1) There is at least one symbol from another religion; AND, (2) at least one secular symbol.

The Government cannot discriminate against religious speech or religion unless it meets strict scrutiny. Thus, for instance, government sponsoring religious activity in public school is unconstitutional.

School prayer is prohibited, as is a moment of silence. religious student and community groups must have the same access to school facilities as non-religious groups.

the government can give assistance to parochial (religious) schools for so long as it is not for religious instruction. Government may provide parents with educational vouchers which the parents may then use in parochial schools.

Now comes the Freedom of Expression And Association.

the level of scrutiny applied is determined by whether the regulation or law is based on content and the location of the speech or action that is being regulated.

strict scrutiny will be applied to content based regulation of protected expression. The regulation is content based usually

when it is a subject matter restriction or a viewpoint restriction.

Regulations are Subject matter restrictions where the application of the law depends on the topic of the speech. For instance, no picketing unless it is a labor protest raises strict scrutiny review.

Regulations are viewpoint restrictions where application of the law depends on the ideology of the message. For example, flag burning is constitutionally protected, while Draft card burning is not protected.

Conversely, intermediate scrutiny applies to content neutral regulation of protected expression.

The regulations are content neutral when it applies to all speech, such as no demonstrations or speech in public parks.

Note that the location where the speech takes place is also very important.

The government is required to make public forums available for speech such as sidewalks and parks, but not that this is not the case for sidewalks on post office property.

Thus in public Forums: (1) the regulation must be subject matter and viewpoint neutral; (2) The regulation must be a time, place, and manner regulation that leaves open alternative places for speech; (3) Regulation does not need to be the least restrictive means; and, (4) City official cannot have discretion to set the permit fees.

However, the government can close limited public forums such as school facilities on weekends. note that once the government chooses to open these limited public forums up, then it must comply with the same rules and regulations as to public forums.

In non-public forums, the government is not required to open them up to the public if it chooses not to. these include: (1) military bases; (2) Areas outside of prisons and jails; (3) Advertising space on the side of city buses; (4) Sidewalks on post office property; (5) Airports; (6) Candidate debates which are sponsored by government owned radio stations.

the government may regulate non-public forums as long as the regulation is: (1) reasonable; and, (2) viewpoint neutral.

Finally, a private property provides no right to free speech. These are properties such as private shopping malls.

Now comes the regulation of unprotected expression. the most popular topic for the exam under this section is obscenity. Note that obscenity is not protected.

The expression is deemed obscene and thus unprotected if the following is satisfied: (1) The material appeals to prurient interest (community standard); (2) the material is patently offensive under law (local standard); and, (3) the material lacks serious redeeming artistic, literary, political, or scientific value(this is a national standard).

If the material is deemed obscene then the government can use zoning ordinances to regulate the location of: (1) Adult bookstores; and (2) Adult movie theaters.

Note that child pornography can be completely banned even if it is not obscene. however the child pornography must depict actual children, and not computer generated or hand drawn images.

the government can punish private possession of child pornography, but cannot punish private possession of merely obscene materials.

Note that the government can seize all assets of businesses convicted of violating obscenity laws, even if some of the assets are not obscene materials.

now we come to profane and indecent speech.

Indecent language such as "F*** the government" is protected even if it is on the Internet and accessible to children.

However, it is not protected if it is on an over the air broadcast such as Television, or radio. Note that this does not include satellite radio, or cable television, or schools.

Speech which is designed to incite illegal activity can be punished by the government if: (1) there is a substantial likelihood of imminent illegal activity; and (2) Speech is directed to causing imminent illegal activity.

Note that defamation is not protected.

In order to prove defamation, a public official or public figure must show: (1) falsity; and, (2) Malice.

If it is a private figure with a matter of public concern then the plaintiff must show: (1) falsity; and, (2) Negligence.

And in cases where it is a private figure with a matter of private concern, then the plaintiff need not show either falsity nor malice.

Non-misleading commercial speech is protected by intermediate scrutiny. Some commercial speech is not protected however.

For instance, false and deceptive advertisements are not protected, and vice advertising, such as the sale of alcohol and tobacco are not protected. Additionally, commercial speech that inherently risks deception can be prohibited. For example, Government can prevent professionals from advertising or practicing under a trade name. the government can also prevent in-person solicitation of clients for professional services while allowing free representation and letter solicitation.

note, however, that the regulation cannot prevent accountants from in-person solicitation of clients.

When the commercial speech is inherently risky, the government regulation is valid if it directly advances substantial governmental interests and is narrowly tailored.

In addition, the regulation of, or imposition upon, public school students, public employees, licenses, or benefits based upon exercise of expressive or associational rights are usually reviewed under strict scrutiny.

As a quick review, the commonly tested regulation of expressive conduct is as follows: (1) flag burning is protected; (2) Draft card burning is not protected; (3) Anonymous speech is protected; (4) Nude dancing is not protected; (5) Burning a cross is protected, unless it is done with an intent to threaten or intimidate; (6) While contribution limits in elections are constitutional, expenditure limits in elections are unconstitutional; and (7) penalty enhancement for hate crimes are constitutional.

Now we cover the regulations with prior restraint, vagueness, and over-breadth.

In regards to prior restraints. This is governmental action which prevents a material from being published, and the court held that the prior restraint is unconstitutional. Except in extremely limited circumstances such as national security issues, this cannot be banned. Applying the same standard gag orders on the press to prevent judicial pretrial publicity is disallowed.

The government can require a license for speech only if: (1) there is an important reason for licensure; and (2) there is clear criteria leaving no discretion with the licensing authority.

Regarding vagueness, a law will be deemed vague if a reasonable person cannot tell what speech is prohibited, and what speech is allowed. In such cases the law will be deemed unconstitutional.

In the case of over-breadth, a law is over-broad when it regulate more speech than the constitution allows to be regulated and is thereby unconstitutional. For instance, laws prohibiting fighting words are over-broad and are thereby unconstitutional.

Freedom of the Press. There is no liability for truthfully reporting information lawfully obtained from the government and no liability if the media broadcasts a video of an illegally intercepted call or signal, if: (1) the media did not participate in the illegal act; and (2) it involves a matter of public concern.

The government does not need to open up its papers and files to the public except in criminal trials.

Now comes Freedom of Association. Laws which prohibit or punish group membership are reviewed under strict scrutiny except when the members: (1) Actively affiliated with a group; (2) With knowledge of its illegal activities; and, (3) with the specific intent of furthering those illegal activities.

Laws which require a disclosure of group memberships where such disclosure would chill association will be reviewed under strict scrutiny.

Laws that prohibit a group from discriminating are unconstitutional unless the group interferes with other protected rights like intimate association or expressive association such as the Ku Klux Klan.

Therefore the Ku Klux Klan is an expressive association which is protected Constitutionally. This is because some groups can discriminate under the freedom of association.

Contracts and Sales

Applicable law

For the Bar Exam there are 2 main sources applicable to contract law: (1) The common law"; and (2) the UCC.

The common law.

Generally common law applies to all contracts, usually those which deal with the sales of services and land.

Article 2 of the Uniform Commercial Code, or UCC

Article 2 of the UCC on the other hand, will apply to contracts that deal with the sales of physical goods.

In order for contract law to apply, the transaction in question must be a sale, which means that it cannot be a gift.

To tell the differences between sales of services and sales of goods contracts, you must look to the subject matter of the transaction.

Sales of goods include personal property and other tangible items while sales of services will include labor and other activity which is performed for economic gain.

On the other hand, in situations where the good is far more important than the services, then the UCC applies.

For instance, where there is a sale of watch that comes with a warranty. even though the warranty is a service, the primary purpose of the transaction is the sale of the watch, which is a good. therefore the good is far more important than the service and as a consequence the UCC will apply in this case.

Now we come to formation of contracts.

A contract is an agreement which is legally enforceable.

Offer.

An offer is a manifestation of a current intent to enter into a contract.

The basic test here, is whether a reasonable person in the position of the offer would believe that his acceptance would create a contract.

in general, an offer is not required to contain all of the material terms. However, some terms will be necessary: (1) In a sale of real estate, the common law requires : (a) price term; and (b) description of the property involved; (2) In contrast, for the sale of goods, the UCC has no price requirement but requires: (a) Quantity term.

Note that vague or ambiguous material terms are not an offer under either the common law or the UCC.

Thus, for instance, Annette offering to sell her car to Barbra for a fair price is not a real offer as it is too vague.

In a production contract, a contract for the sale of goods may state the quantity of goods to be delivered pursuant to the contract in terms of: (1) the buyer's requirements; or, (2) The seller's output.

For example, Buyer agrees to buy chocolate from Seller for three years. There is no specific quantity term in the agreement. Instead the agreement implies that buyer shall purchase all of its chocolate from seller.

in this case, Buyer can increase the quantity of goods within a reasonable number. A change within ten percent is a reasonable number for Bar exam purposes. thus, for example, if buyer buys 1,000 orders of soap from seller each year for the first two years, and then on the third year buyer wants to buy 2,000 orders of chocolate, or 100% increase in the quantity of the contract, this would be deemed unreasonable as it is above the ten percent margin which is considered reasonable.

Typically, advertisements or price quotations do not constitute offers. they are invitations for others to submit offers. This is, of course, unless a price quotation is a response to a

specific inquiry or, if an advertisement specifies its quantity and states who may accept it.

For instance, advertisements on Ebay are considered offers as they state the price of an item and who may buy it.

There are four ways to terminate an offer: (1) Lapse of time; (2) revocation by the offeror; (3) rejection by the offeree; and, (4) Death of either party prior to acceptance. It is also important to recall that an offer may not be accepted once it has been terminated.

with regards to the first way to terminate an offer, or lapse of time; the time is usually stated in the contract as an expiration date, or a reasonable time.

For the bar exam, a reasonable time is usually 30 days.

In regards to the second method of termination or revocation; revocation is a clear statement by the offeror to the offeree of unwillingness or inability to contract. This is also the case when an offeree is aware of the offeror's unwillingness or inability to contract.

So, for instance: Annette offers to Barbara; Then Annette offers to Chelsy. Annette didn't say anything to Barbara, but Barbara heard Annette's offer to Chelsy. Because Barbara is aware of Annette's unwillingness to sell, then revocation is effective.

when revocation of an offer is sent via mail, the revocation will not be effective until the mail is received.

generally, before the offeree accepts an offer, the offeror can revoke the offer at any time unless it is an option.

An option is where the offeror has promise to keep the offer open, and this promise is supported by separate consideration. Under the UCC this is known as the firm offer rule.

A firm offer rule may be held open for 3 months if the following conditions are satisfied: (1) the contract is for the sale of goods; (2) the contract is a signed, written promise, specifically, to keep the offer open; and, (3) The party is a merchant.

Merchant is very important concept in contract law.

The UCC has provided a whole set of higher standards for merchants.

A merchant is an individual who deals in the type of goods involved in a transaction or holds themselves out as having special knowledge in the goods. This is the reason why a firm offer will only be held valid for 3 months if the party is a merchant.

Furthermore, An offer cannot be revoked if there has been a detrimental reliance by the offeree and this detrimental reliance was reasonably foreseeable.

Note that the start of performance pursuant to an offer creating a unilateral contract makes the offer irrevocable for a reasonable time in order to complete performance.

For instance: Cowboy-Jim offers Cowboy-Tim \$4,500 dollars to ride Chicago the Bull for 30 seconds. If cowboy-Tim starts to ride Chicago the Bull, then Cowboy-Jim cannot revoke his offer.

Note that mere preparation is not defined as performance. Thus if Cowboy-Tim merely bought a saddle, but had not started riding Chicago the Bull then the offer could be revoked by Cowboy-Jim.

now we come to rejection by the offeree. Rejection refers to the words or conduct of an oferee.

There are several ways to reject an offer: (1) Counteroffer; (2) Conditional Acceptance; (3) Indirect rejection.

Counteroffers terminate the offer and become a new offer. Remember, that bargaining does not terminate an offer. Thus Adam Tells Stanley I'll buy your motorcycle for \$400.00 is an offer. Whereas Adam asking Stanley will you take \$400.00 for that bike? would merely be bargaining and would not terminate the offer.

A conditional acceptance also terminates the offer and becomes a new offer. This is where Farmer Foid offers to sell his farm to General Ike for \$100,000. Ike says "I accept, but you have to chop down the Apple tree first". That is a conditional acceptance.

Indirect rejection, which happens when there are additional terms may constitute an acceptance depending on the type of contract involved.

Under the Common law the mirror image rule governs. the mirror image rule states that an acceptance with additional terms is treated like a counteroffer as opposed to an acceptance.

Conversley the UCC treats an acceptance with additions terms as acceptance with a "seasonable expression of acceptance".

Thus under the UCC where one party offers to sell the other party goods, and that other party responds with additional terms, there are two general questions which are raised: (1) Is there a contract?; and (2) Are the additional terms a part of the contract created?

In the example here, the answer to (1) is yes because when the contract is for the sale of goods, additional terms merely makes it an acceptance with a "seasonable expression of acceptance".

The Answer to (2) Will be yes provided that: (a) both parties are merchants; and, (b) the offeror does not object to the terms; and (c) the terms do not materially change the offer.

Note that if one or both of the parties is not a merchant, then the additional terms are merely a proposal that can be separately accepted or rejected, but there is still a valid contract.

In regards to Death of either party: generally the death or incapacity of either party will terminate an offer, but there are two exceptions: (1) when the offer is about an option, even death or incapacity does not terminate the offer; and, (2) when there is part performance of an offer to enter into a unilateral contract, even death or incapacity does not terminate the offer.

Remember that a unilateral contract results from an offer which expressly requires performance as the only possible method of acceptance.

now we come to Acceptance of an offer. remember you cannot accept an offer, thus before you can consider acceptance you must find a valid offer.

it is important to know: (1) Who can accept an offer; (2) And how the offer can be accepted.

Generally an offer can be accepted only by a person: (1) who knows about the offer and; (2) To whom the offer was made to.

For instance, if I offer to sell you this outline for \$200, then the offer is valid for you to accept. If your cousin found out about the offer, the offer is not available for him to accept because it was not made directly to him. Thus an offer is not assignable to a third party.

Also, an offer can only be accepted by one who knows of the offer. Thus if I lost a gold watch, and put out a reward offer, and Doofus Ducas found the watch, and returned it to me without knowing of my offer; then Doofus Ducas cannot accept the offer because he was unaware of it.

While an offer is non-transferable to a third party, an option is.

Thus, if you pay me \$30 for a 10 day option to buy this outline for \$200, you can transfer your option to a third party.

If a party is: (1) aware of the offer made to him; (2) wants to accept the offer; the party must still accept the offer in the proper way.

There are 3 ways of acceptance which are the most common: (1) the offeree starts to perform; (2) the offeree promises to perform; or, (3) The offeree sends his acceptance through the mail.

In regards to offeree accepting by the start of performance. the starting of performance is considered acceptance of an offer to enter into a bilateral contract, but it does not act as acceptance of an offer to enter into a unilateral contract.

Remember that a bilateral contract is open as to the method of acceptance, so the start of an offeree's performance constitutes acceptance.

On the other hand, A unilateral contract requires full performance for acceptance, thus the start of performance does not count as an acceptance. Rather, as in the Cowboy Bull-riding example earlier, the start of performance creates an option making the unilateral contract irrevocable by the offeror until the offeree has a reasonable time to complete performance.

With respect to the second most common method of acceptance, the offeree promises to perform. Most offers can be accepted by a promise to perform. of course, when a promise to perform is made on a contract which expressly states that it can only be

accepted by full performance, then it will not constitute as acceptance because that is a unilateral contract which can only be accepted by full performance. A good example of this would be the reward contract for the lost gold-watch.

In regards to acceptance sent through the mail; generally an offer which is invited to be accepted by the mail will be accepted once the acceptance is posted. this is known as the mail-box rule.

Note that there are three common exceptions which re tested on the exam: (1) whether the offer states additional requirements for acceptance such as telephoning to accept-Mail-box rule inapplicable; (2) situations where the rejection is posted before or after acceptance, in which case the mailbox rule does not apply. Whichever communication arrives first controls; and, (3) If the contract subject matter is an option. when the deadline is specified in an option, then acceptance must be received by that date, and not by the mailbox rule.

For example If I offer Billy North-easterner to rotate his tires on his Not-so-smart-car for \$400.00 and state that If he pays \$100.00 up front, then the offer will remain valid for 3 days, then the mail-box rule does not apply. Billy must accept within 3 days. However, If the offer is the same as above but doesn't state a definite time for which the option is open, then the mail-box rule will apply.

There are common fact patterns which are tested on the bar exam: (1) if a seller of goods sends the wrong goods then this generally amounts to an acceptance and a breach. An exception is when the goods come with an accommodation, such as a letter with an explanation. In such a case this is considered a counteroffer as opposed to a breach; (2) Silence is not acceptance UNLESS the offeree agrees that silence is acceptance. For instance, If Armond told Jerry that if Jerry doesn't hear from Armond by Friday, then Armond accepts. In this case silence constitutes acceptance.

Now comes Consideration or a consideration Substitute.

Consideration is a bargained for legal detriment, which essentially means that ti cannot be a gift. there are several forms of consideration. The most common ones are: (1) Performance; (2) Forbearance; (3) Promise to perform; and, (4) Promise to forbear.

Performance is defined as doing something which one is not legally obligated to do. Forbearance is not doing something one is legally entitled to do.

Note that adequacy of consideration is irrelevant in contract law, however, the timing of a consideration is often tested.

In general, past consideration is not a consideration unless it was expressly requested and expected.

For Instance, Big-Businessman and his wife were at a party, A robber breaks in and nabs Wife. Loony Laborer drops his glass of wine and dashes over and slugs robber. Big-Business man is so relieved that he tells Loony that he will give him \$40,000 for saving his wife. In this example there is no contract because past consideration is no consideration.

If, on the other hand; Big-businessman requested that Loony Save his wife, knowing full well that Loony, like most labor unions, only cared about himself, and thus would expect compensation, and the scenario plaid out as it did in the aforementioned example; then the outcome would be a contract. This is because: (1) Express request; (2) With knowledge that there was expectation of compensation; and (3) reliance on that offer. Therefore it would be a contract.

when it comes to Contractual or statutory duty rule, note that there are differences between the common law approach, and the UCC approach.

Under the common law, the general rule is that performance of preexisting contractual or legal duties is not a consideration except when: (1) There is unforeseen difficulty so severe as to excuse performance; or, (2) When a third party makes the promise because that third party wouldn't have the preexisting contractual or legal duty.

On the other hand, the UCC does not have the pre-existing legal duty rule. Rather Good faith is the test for any changes in an existing sale of goods contract.

with respect to using part payment as consideration. If a payment is: (1) Due and; (2) Undisputed: then part payment is not a consideration for release.

But, if the Payment is: (1) not yet due; and, (2) Disputed; and, (3) The payee agrees to take payment when it is not yet due, or

when it is still disputed, then this may constitute a consideration for release.

An example of the types of consideration which are usually wrong answers on the bar exam is an illusory promise.

Generally illusory promises, or a promise in which the promisor has not committed himself in any manner. This is not a consideration. there is no detriment involved and no real promise is involved.

An exception is that there is consideration when what appears to be an illusion creates a new obligation.

For instance Bob tells Sally that he will buy her dog for \$200.00 unless he changes his mind by Wednesday.

while "unless he changes his mind" on its own would constitute an illusory promise; the additional condition of "by Wednesday" adds a new obligation.

sometimes a consideration does not exist, but a consideration substitute exists.

A written promise to pay debt barred by technical defenses such as the statute of limitations can be a consideration substitute. The general rule here is that a written promise to satisfy an obligation for which there is a legal defense is enforceable without consideration.

For example, Donna owes Carl \$1,000. Legal action to collect this debt is barred by the statute of limitations. Thus the time to sue has expired. Donna writes to Carl stating that she knows that she owes him \$1,000; and that she will pay him \$700.

In this case Carl can collect the \$700 because it is a written promise to satisfy an obligation for which there is a legal defense, thus the new deal is enforceable without consideration.

Another Contract which is enforceable without consideration is one under the UCC where a written release of all or part of a claim for breach of a contract for the sale of goods is involved.

Now we come to the most common consideration substitute; Promissory Estoppel.

The elements of Promissory estoppel are as follows: (1) A promise; (2) Reliance which is reasonable, detrimental, and foreseeable; and, (3) enforcement is necessary so as to avoid injustice.

Thus, in short, when there is a promise, and someone relies on that promise, where such reliance is reasonable, detrimental and foreseeable, then enforcement is necessary to avoid injustice.

The difference between consideration and promissory estoppel is that in Promissory estoppel nothing is for exchange. A state or a promise is relied on, and that reliance is reasonable and foreseeable.

For Instance, Tom tells Bob that he will sell Bob his laptop. Bob, relying on Tom's promise, sells his old laptop to a used computer store so that he can have the funds to purchase Tom's laptop. When Bob goes to collect the Laptop Tom said he sold it to Martha. Promissory Estoppel is at issue here. Nothing was actually contracted for a transfer between Bob and Tom here, however Tom detrimentally relied on Tom's statement, and his reliance was reasonably foreseeable, so in order to avoid injustice here, the contract would be enforced under Promissory Estoppel.

Now comes defenses to contract.

even if there was a valid offer, acceptance, and consideration, there are still defenses to the formation of contract.

The first defense is the lack of capacity to contract. Thus, people who lack capacity to contract must be identified, and they include the following: (1) Infants or people under 18 years of age; (2) Mental incompetents who lack the ability to understand the agreement; and, (3) intoxicated persons, if the other party had reason to know of the intoxication.

The consequences of incapacity includes the right to disaffirm by the person lacking capacity. Thus parties over 18 are bound by contracts, whereas parties under 18 are not.

But, there is an implied affirmation rule. Therefore if Agnes made an agreement while under the age of 18, and upon turning 18 thus gaining capacity, she continued to receive benefit from the prior agreement, implied affirmation makes the contract enforceable against Agnes, even if she made an agreement before she was 18.

Furthermore, even a person lacking capacity is obliged to pay for necessities such as rent and utilities.

The next defense, which is a very important defense, is the Statute of Frauds. The purpose of the Statute of Frauds is to provide proof that the so-called agreement was actually made.

Not all contracts have to be in writing, but it is important to determine when a contract is within the Statute of Frauds.

Under the Common law this occurred where: (1) Promise in consideration of marriage—This does not mean a promise to marry, rather it is a promise to do or refrain from doing something if the marriage takes place, hence prenuptial agreements must be in writing; (2) promise by an executor or administrator to pay an obligation of the estate out of the administrator's own funds. This falls under the Statute of Frauds; (3) When a person promises to pay for the debts of another then this is a guaranty and falls under the statute of frauds (be careful the difference of one word can be critical here); (4) Where a services contract, by it's terms cannot be completed within one year, then the Statute of Frauds applies; and (5) Contracts for the sale of goods over \$500.00 also must be in writing as per the Statute of Frauds—remember "MY LEGS".

For services contracts which cannot be completed within one year. Remember that a contract for employment for life is not within the statute of Frauds because the promisee could die tomorrow.

Note also, that a real estate contract which cannot be completed within one year it too must be in writing pursuant to the Statute of Frauds. Think of a lease agreement which cannot be fulfilled in less time than one year and one day, that must be in writing.

For the UCC contracts, the Statute of Frauds can be satisfied usually by either performance or by a writing. The dependence is on the type of contract involved. In a services contract, for example, full performance by either party will satisfy the statute of frauds, but part performance of services contracts does not satisfy the statute of frauds. (note UCC doesn't apply here).

However, in a contract for the sales of goods, generally, part performance of a contract for the sale of goods satisfies the

Statute of Frauds, however it is only to the extend of the part performance.

Note that there is a specially manufactured good exception. Where the contract for the sale of goods involves specially manufactured goods, then the substantially beginning of building or obtaining materials satisfies the statute of frauds.

In the case of a Real estate transfer contract, full payment by the buyer of the contract price does not satisfy the Statute of Frauds, but part performance by the buyer can satisfy the statute if two of the following three factors are satisfied: (1) Part payment; and/or, (2) Possession; and/or; (3) improvements to the land.

Under the common law, in order to generally satisfy the statute of Frauds by writing, the writing itself had to contain all material terms which includes the: (1) Who; and, (2) What.

Furthermore the contract must also be signed by the person to be charged, or sued, such as the defendant.

Under the UCC, generally the writing must include the quantity term and must be signed by the person being charged, or both parties must be merchants, and the person receiving the signed writing with a quantity term that claims that there is a contract fails to respond within 10 days of its receipt.

Thus the statute of frauds is a defense to the enforcement of the agreement if the statute is not satisfied.

Now that the basics of Statute of Frauds has been covered, now we will examine some related issues of the Statute of Frauds.

First, when does a person need to have written authorization in order to execute a contract for someone else? The answer to this question is that the authorization must be in writing if the original contract to be signed is within the Statute of frauds.

The next related issue is when does a modification of a contract have to be in writing? The answer to this question is that if the contract, including the modification, is within the statute of Frauds, then the modification must be writing.

Now comes illegality, misrepresentation and Duress.

The key word in this section is illegal. If the subject matter is illegal, then the agreement is void.

If the subject matter is legal, but the purpose is illegal, then the agreement may be enforceable, but only by the person who was unaware of the illegal purpose.

Misrepresentation as to the terms of a contract is voidable. For Example, Bob offers to sell his original copy of the 1923 film Flaming Youth to Sally. Bob says that there is no nitrate decay on the film, when in actuality there is. The contract may be void, or it may not be void. Thus it is said to be voidable.

However, Misrepresentation as to the nature of the contract is void. For instance, if in the example above Bob said he would sell, but only meant to rent the film so that Sally Could make a copy of the original film, but not to own it, then the contract is void because the nature of the contract was misrepresented.

To completely understand the misrepresentation defense, we must examine the nature of the statement.

If the statement is fraudulent, or is it simply material? for example, if a seller sold a house to buyer and stated that the house didn't have any water damage, when in fact it did, and the seller honestly believed that the house didn't have any water damage, in that case his misrepresentation was merely material and was not fraudulent.

Furthermore, if the case was based on reliance, for instance Seller claimed that his 1923 copy of Flaming Youth didn't have any nitrate damage on it, and the buyer relied on the statement of an inspector who also said that there was no nitrate damage on the print, and not on the seller's statement, then there is no misrepresentation defense available.

Duress is another defense. the elements of Duress include: (1) One party, the defendant improperly threatens; (2) the other party the plaintiff; (3) With no reasonable alternative, or in a vulnerable situation; and, (4) The parties entered into an agreement.

Then in that case duress is a defense to contract. In short, it means that you cannot put a gun next to someone's head and force them to sign a contract. Duress will be their defense to contract.

Next is the unconscionability doctrine. Under this doctrine a court is generally empowered to refuse to enforce all or part of an agreement.

The two basic tests are: (1) Unfair surprise; and, (2) Oppressive terms. these are both tested at the time the agreement was made.

Note that if the terms were fair at the time it was made, even if they become unfair later, the contract is still deemed fair.

Another defense to contract is ambiguity. there will be no Contract if: (1) Parties use a material term that is open to at least 2 reasonable interpretations; (2) Each party attaches different meanings to the terms; and, (3) neither party knows, or has reason to know the meaning attached by the other.

For instance, Film-Mogul contracts to sell "Ben Hur" to Silent-film-fan. Film-Mogul intends to sell the 1959 version of the film to Silent-film-fan; Silent-film-fan believed that he was acquiring a copy of the 1925 silent copy of the film; and neither knew of the other's interpretation of the term "Ben Hur" which is a material term, in this case Ambiguity is defense.

If however, Film-Mogul knew of Silent-film-fan's belief, and sold him the wrong copy anyway, and Silent-film-fan had no idea of the term. then there is a contract with the interpretation of the ignorant party holding.

Another kind of misunderstanding is called the Mistake of fact doctrine. There is no contract if both parties were mistaken with a basic assumption of fact that materially affects the agreed exchange.

For example, Conman wants to sell his theater organ to Schmuck. While both Conman and Schmuck believe that the organ is in proper working order, half of the pipes are in non-working order. This contract is unenforceable because both parties are mistaken with a basic assumption of fact which materially affects the agreed upon exchange.

On the other hand, if Conman wants to sell Schmuck a theater organ which they both believe is worth \$1,000,000 when in fact it is worth \$2,000,000, the contract is still enforceable because the mistake does not materially affect the exchange.

when it is a unilateral mistake of material fact, the courts, generally have been reluctant to allow a party to avoid a contract for a mistake made by only one party, except when there is palpable mistake.

There is palpable mistake when one party knows of the mistake or should have known of the mistake, in those cases courts may grant relief to the mistaken party.

Additionally, when it is a unilateral mistake of material fact, the party who discovered the mistakes, before any significant reliance by the other party, can use unilateral mistake of fact as a defense to get out of the contract.

Now comes terms of the contract.

The Parol evidence Rule

The most common issue is whether the seller and buyer have further discussion or agreement about a transaction after its contract has been formed. The question becomes are the new conditions a part of the contract?

The answer is generally no, because the Parol evidence rule typically states that using written contracts as the source of contract terms has an exclusionary effect on earlier or contemporaneous agreements as a possible source of terms for the contract, therefore the terms are usually not a part of the written contract.

The Parol evidence rule is triggered where there is: (1) A written agreement that the court finds is the final agreement between the parties; (2) An oral statement made at the time that the contract was signed; or, (3) When an earlier, but not later, oral or written statement is made by the parties to the contract.

Despite the parol evidence rule, earlier agreements can be considered to resolve ambiguities in written contracts. (for instance, if the contract for Ben-hur was written, and Silent-film-fan told Film-Mogul that he wanted the 1925 film, such evidence would be admissible despite the parol evidence rule, to clear up the ambiguous term "Ben-Hur")

The parol evidence rule prevents a court from considering earlier agreements as a source of: (1) Consistent; (2) additional terms; (3) Unless the court determines that the written agreement is only a partial integration.

Agreements which may trigger the parol evidence rule usually fall under one of the following three categories: (1) Partial integration: Where the contract is written and final but not complete; (2) Complete integration: where a contract is written, final and complete; or, (3) A merger clause, which is a contractual clause stating that the agreement is the final and complete agreement of the parties.

even if the writing is a complete integration, a court can still consider the evidence from earlier agreements for terms that would naturally and normally be in a separate agreement.

Regardless of whether or not the writing is a complete or partial integration, the parol evidence rule will prevent a court from considering earlier agreements as a source of terms that are: (1) Inconsistent with the terms in the written contract; (2) A court may however, consider evidence of such terms for the limited purpose of determining whether there was a mistake in integration, usually meaning a mistake made in the process of reducing the oral agreement to writing.

Other Sources of terms.

Other than words of the parties, other sources of contracting terms includes: (1) course of performance; and, (2) Course of dealing.

Course of performance is when the same people are involved in the same contract. In these situations a court will use what the parties did in the beginning of the contracting period in order to establish that the same performance is expected at the end of the contracting period.

Course of dealing is when the same people are involved in a different contract from the one in question, and they have dealt with this type of contract before. In this situation, a court can use what the custom and usage is in the industry to determine what the terms of the contract ought to be.

Now comes UCC terms interpretation.

When it comes to sales of goods, then the UCC governs, and thereby UCC terms should apply.

One issue which is often tested is the delivery obligations of the seller.

When the place of delivery is absent in an agreement, the place of delivery is automatically the seller's place of business. If the seller doesn't have a place of business then it is his house.

However, if both parties know that the goods are somewhere else, in that case, the location is then the place where the goods are located.

If a place of delivery is in an agreement, the question then becomes: "What must the seller do to complete his delivery obligation"?

the answer will depend on whether the type of contract is a: (1) Shipment Contract; or, (2) Destination Contract.

In a shipment contract, where "free on board" is followed by a city of the seller's location, the seller completes his delivery obligation when he gets the good to a common carrier and makes reasonable arrangement to notify the buyer of the shipment.

In a destination contract, where "free on board" is followed by a city of the buyer's location, then the seller does not complete his delivery until the goods arrive where the buyer is.

Another important issue regarding shipment of goods is "risk-of-loss".

The fact pattern on the bar exam usually involves goods that are damaged or destroyed and neither the buyer nor the seller is to blame.

There are 4 types of risk-of-loss rules: (1) Agreement; (2) Breach of contract; (3) Delivery by common-carrier; and (4) merchant risk shift.

Agreement is when the parties, the buyer and the seller, have an agreement on the issue of Risk-of-Loss, the agreement of the parties controls.

Breach of contract is when someone breached the contract (amazing isn't it?), the breaching party is liable for: (1) any uninsured loss; (2) even if the breach is unrelated to the problem.

Delivery by common carrier is where the good was delivered by common-carrier and not the seller. Here the risk of loss shifts from the seller to the buyer at the time that the seller completes his delivery obligations (typically putting the goods in the hands of the common-carrier).

If the seller is a merchant, then the risk-of-loss shifts to the buyer upon the buyer's "receipt" of the goods. If the buyer never takes possession, then the seller remains with the risk-of-loss.

Thus it is important to remember, that when there is no agreement, no breach, and no delivery by the carrier, the key question becomes: whether the seller (not the buyer) is a merchant.

Thus: (1) If the seller is a merchant—then the risk-of-loss shifts on the buyer's receipt of the goods; but, (2) If the seller is a non-merchant, then risk-of-loss shifts to the buyer when he tenders the goods or makes them available.

Warranties as a term of the contract.

Be aware that an issue regarding parol evidence may also be involved. In order to identify an express warranty look for the following: (1) Words of promise; (2) Words that describe or state facts; (3) which are not merely puffing, like: (a) Opinions.

For example: Ella Cinders is an excellent movie—That is a statement of opinion and cannot amount to an express warranty; however the statement " This copy of Ella Cinders is in excellent condition; and is a nitrate print"—That is a statement of fact and an express warranty can be based off of it.

Another way to create an express warranty is through the use of a sample, or model. the showing of a sample of model creates a warranty that the goods that the buyer receives will be like the sample or model shown.

Therefore if you want the all new Pare-phone rotten, and you go to the Allfony Tech Telephone store, and they have a model of the Pare-phone rotten; and you state you want that model, and in fact they sell you the Pare-phone Putrid, which is the same phone, but instead of having a fish-eye lens camera, it has a night-vision camera. that is a breach of an express warranty.

Simply by having the models on display, the Allfony Tech Telephone store warranted that the phone the consumer would receive would be the same as those on display.

Express warranty is much easier to identify than the implied warranty.

The most seen warranties on the bar exam are the implied warranty of merchantability, and the implied warranty of fitness.

The implied warranty of merchantability automatically adds the term "these goods are fit for the ordinary purposes for which such goods are used" to the contract by operation of law when buying from a merchant.

Thus to find an implied warranty of merchantability, all you need to look for is a merchant seller who deals in goods of that kind. That is because, by simply being a merchant seller, the contract promises that the goods are fit for their ordinary purposes.

the other kind of implied warranty is the implied warranty of fitness.

This occurs when the buyer has a particular purpose and is relying on the seller to select suitable goods and the seller has reason to know of the purpose and reliance.

In that case, the implied warranty of fitness applies, and the goods should fit for that particular purpose.

there are some Contractual limitations on Warranty Liabilities; For example a disclaimer may eliminate implied warranties; a disclaimer may not eliminate express warranties.

If a buyer buys goods after seeing a sample and then signs a contract with a disclaimer, the warranty that comes with that sample still cannot be disclaimed.

On the other hand, implied warranties of merchantability and fitness can be eliminated with language such as: (1) As is; (2) With all fault; or, (3) A Conspicuous language of disclaimer, specifically mentioning "merchantability."

It is possible to set a limitation of remedies for both the express and implied warranty liabilities. generally, the limit must not be unconscionable. If, for example, breach of warranty

on consumer goods causes personal injury, then a limit to merely repairing damage to the consumer good is definitely unconscionable. For example, a chair should not have sharp materials on its surface.

Performance condition.

A condition must be distinguished from a conditional acceptance.

A condition is a part of a contract, it is agreed to by both of the parties to the contract, while a conditional acceptance is a part of the response to the offer, agreed to only by the offeree.

A true condition therefore is an event beyond the influence of either party which affects the duty to perform.

Condition coupled with a covenant is an event that is to some extent within the influence of one of the parties to the contract that affects the duty to perform. Note that a condition precedent is a condition that must occur before performance; and a condition subsequent is a condition that must not occur during the performance.

Different conditions set different standards for satisfying the condition.

For example an express condition is created by language of the contract. Such as The parties agree to watch the movie provided that the movie is in Technicolor.

Words such as "if", "Provided that", "so long as", and "subject to" create express conditions. The standard for express conditions is the highest as the contract requires that there be a strict compliance with such conditions.

For example: I promise I will take you to San Jacinto if I make partner--is conditional upon the occurrence of a specific event. if the condition "Making partner" does not occur, then the promise is excused. In contrast, constructive conditions are created by operation of law.

the most common fact pattern is that a contract is silent as to time of payment. In such situations, doing the work is a constructive condition precedent to the payment performance.

A constructive condition requires a substantial performance standard.

An example of the substantial performance standard would be if a buyer tells the seller that all pipes must be white and the seller installs blue pipes instead.

While the words "must be" is in the statement, in order to be magic words, they must be in the contract in order to be an express condition. Since the color of the pipe doesn't interfere with the function of the pipe, it is not a breach of contract, so upon installation, the work is substantially performed.

Note that in the case of constructive conditions, the buyer will pay for the damages.

Sometimes performance can be divided into several stages. If the contract itself divides the performance of each party into the same number of parts, whereby each part performance by one party serves as consideration for the corresponding part performance by the other party, then the contract is a divisible contract; and the substantial performance test is applied to each divisible part of the contract.

there are exceptions to the express condition's strict compliance standard. An express condition can be excused where the person who benefits from the condition is the one who is giving up the condition.

Note that some conditions are presented in either: (1) Estoppel; or (2) Waiver.

Estoppel is based on a statement by the person protected by the condition before the conditioning event was to occur and requires a change in position.

for example a landlord tells a tenant that rent has been reduced if there was a lapse in utility services. Then, there is a lapse in utility services, so the condition occurs, if the tenant detrimentally relied on the landlord's advice about the reduced rent, then the landlord could be estopped from collecting the full rent retroactively.

Additionally, a waiver is based on a statement by the person protected by the condition after the conditioning event was to occur and does not require a change in position. Thus if Annette tells Barbra that if Annette passes the bar exam then Barbra

does not have to give Annette back the books that Annette lent Barbra. Annette then passes the bar, she is now barred from taking the book back from Barbra.

Furthermore failure to cooperate under a condition coupled with a covenant is another exception to the express condition's strict compliance standard.

for example, Seller enters into a contract to sell his house to Buyer for 100,000 dollars. The contract provides that the sale needs the buyer to have a mortgage, but the buyer makes no effort to obtain a mortgage. The condition is to buy the house from the seller, and the covenant is for buyer to have a mortgage. Buyer fails to cooperate, and so Seller can sue buyer if buyer refuses to buy the house.

UCC sale of goods Performance concept.

Under the uCC, except for an installment contract, the seller must tender a perfect tender, which means that the seller must tender the correct number of conforming goods at the time specified in the contract or the buyer can reject the goods without liability.

However, the seller has a limited right to cure after a nonconforming tender.

thus the seller has an option of curing in two scenarios: (1) When the time for performance has not yet expired, then the seller has an option of curing; and, (2) If the time for performance has expired, the statutory test is whether the seller has a reasonable ground for believing that the improper tender would be acceptable, if with a discount.

Rejection of the goods must occur before acceptance of the goods. if the goods are less than perfect then the buyer has the option to reject them unless it is an installment sales contract.

An installment sales contract requires or authorizes: (1) delivery in separate lots; (2) those lots must be separately accepted.

Thus, generally the buyer has the right to reject an installment only when there is a substantial impairment in that installment which cannot be cured.

Acceptance of the goods questions come in 3 common scenarios:
91) express acceptance is acceptance (statement of acceptance);
(2) Payment without inspection is not acceptance. Notice that just because the buyer makes payment does not mean that the buyer has accepted the goods; (3) Implied acceptance happens when the buyer keeps the goods after inspection without objection.

For the bar exam, 30 days or more is usually the magic number for the scenario. If the buyer keeps the goods without objection, then the buyer has accepted the goods after the passage of 30 days.

Generally, if a buyer accepts the goods, then he cannot later reject them. But, in limited circumstances, a buyer can effect a cancellation of the contract by revoking his acceptance of the goods.

A buyer can revoke the acceptance when all of the following three factors occur: (1) nonconformity substantially impairs the value of the goods; (2) Excusable ignorance of grounds for revocation or reasonable reliance on the seller's assurance of satisfaction; (3) Revocation within a reasonable time after discovery of the nonconformity.

Thus after a rejection of the goods or revocation of acceptance of the goods, the buyer has to always seasonably notify the seller, hold the goods for the seller, and follow reasonable seller instructions. As a result of the rejection or revocation of acceptance, the goods will be returned back to the seller, the buyer has no obligation to pay. The transaction simply doesn't happen.

Failure of a condition.

If a party's duty to perform is conditional, then failure of the condition excuses the duty to perform.

Other party's breach.

When another party breaches this includes 5 excuses of nonperformance.

(1) In the UCC, if the tender is less than perfect, the buyer can reject the goods and withhold payment. In this case the buyer is excused from paying.

(2) Excuse in Common law will occur where there is a material breach. The material breach is required. Which is to say, that generally in the common law, the requirement is only substantial performance. Therefore if one party to a contract substantially performs, the other party is required to perform. A minor breach, on the other hand, will not excuse performance by the other party.

(3) Excuse by Anticipatory Repudiation or inability to perform. Anticipatory Repudiation is a statement that either the repudiating party will not perform or was made prior to the time that performance was due. Anticipatory Repudiation by one party thereby excuses the other party's duty to perform. Anticipatory Repudiation can be reversed or retracted for so long as there has not been a material change in position by the other party.

If the repudiation is timely retracted, the duty to perform is reimposed but performance can be delayed until adequate assurance is provided.

(4) Excuse by reason of later contract. For instance, rescission or cancellation of the contract is an excuse to perform. Therefore, Frank tells John that he will give him a Steinway piano in exchange for painting his house, and Frank delivers the piano after John accepted, and then John finds that the price of paint is too expensive, and says that he wants to cancel the contract (or rescission) in this case it will not be a valid rescission.

This is because the key to whether the rescission is valid, is whether a performance is still remaining from EACH of the contracting parties. Usually it is too late to cancel a contract if one party has already completed the work. Thus in the Steinway example, Frank already did his part of the bargain, thus the rescission is not valid.

another excuse by reason of a later contract which can happen by Accord and Satisfaction.

Accord is an agreement by the parties to an already existing contract that the same parties will do something different that will extinguish or satisfy that existing obligation. Satisfaction is the performance of the accord and suspends legal enforcement of the original obligation, so as to provide the other party time to perform the accord.

Thus in the Steinway example, Frank and John can agree that if John paints the shutters of the house instead of the entire house, that will satisfy the original agreement. That would be an accord and the painting of the shutters of the house would be the satisfaction.

Now if John breaches this new agreement Frank will have two options available to him. (1) Frank can sue on the original obligation; or, (2) He can sue on the accord.

Sometimes a new party will come into the contract. This is known as Novation.

A novation is an agreement between both parties to an existing contract to the substitution of a new party. A novation will excuse the contracted party of performance of the party who is replaced. It requires that both of the original parties to the contract agree to the novation, and excuses the person replaced from any liability for non performance.

Thus, in the Steinway example, Frank and John agree that in exchange for releasing John from the original contract and replacing him with Tobey for the piano, Then John will be released from his duties to the contract pursuant to a novation.

On the other hand, delegation does not require the agreement of both parties, and will not excuse the original party.

Thus, in the Steinway example, John tells Tobey, who owes him a debt, that he will excuse the debt, if Tobey will paint the house. John doesn't tell Frank about this delegation, and Tobey begins the work. If Tobey finishes, John will keep the piano and the contract will be satisfied; if Tobey doesn't perform his task, then John is still liable to Frank.

(5) Impossibility or impracticability or frustration of purpose.

Performance of contractual duties, other than a contractual duty to pay money, can be excused under impossibility or impracticability or frustration of purpose.

An event that gives the impossibility excuse happens: (1) After contract formation; but, (2) before completion of contract performance.

The event must be: (1) unforeseen; and, (2) Make performance impossible or commercially impracticable, or frustrate the purpose of the performance.

A common fact pattern in common law is the death of a party. In the UCC, it usually involves damage or destruction of the subject matter of the contract. For instance, if the house in the Steinway example burns down, also destroying the piano within the house, then the defense of impossibility, impracticability, or frustration of purpose will be available to John.

Furthermore, subsequent laws or regulations can be an excuse to non-performance if the subject matter of the contract was ruled illegal after the formation of the contract. This is known as "Supervening illegality".

Now comes remedies for breach of a contract.

Breach remedies are remedies that one party can ask to receive when the other party breaches the contract.

On the bar exam, when you see a dollar amount, they can be categorized into either: (1) punitive damages; or, (2) Liquidated damages.

First, Punitive damages.

Punitive damages are not generally recoverable for a breach of contract. In order to identify punitive damages, look for a penalty clause, or an amount which is 2 times or more than the subject matter's value.

Liquidated damages.

Liquidated damages are generally recoverable when a contract stipulates damages or a method of fixing said damages.

There are two typical tests for determining whether a contract provision is a valid liquidated damages clause: (1) at the time of the contract, whether the amount of possible damages, from any later breach of contract, is difficult to determine; and, (2) At the time of contract, whether the contract provision is a reasonable forecast of possible damages.

The ordinary damages rules for contracts under the common law.

In common law, generally, the injured party is entitled to recover an amount that would put him in as good of a position as if the contract had been completely performed. Thus you would include: Compensatory damages (returning to that position of completed)+ foreseeable consequential damages+ incidental damages-avoidable damages.

The party is entitled to recover foreseeable consequential damages because the injured party can also recover costs he incurs in dealing with the breach.

Incidental damages are available because the injured party can also recover for consequential or special damages, that were in reasonable contemplation of both parties at the time of the contract.

Avoidable damages, should be excluded from the damages calculation. this is because there is no recovery for losses which could have been avoided by appropriate steps.

Note that the burden of proof of avoidable rests with the defendant.

Now comes the damage rules for sales of goods contracts per the UCC.

The major difference between the common law and UCC damages rules is that the UCC actually differentiates between a seller and a buyer.

When a seller breaches, the buyer keeps the goods and gets the fair market value of a perfect-delivered good minus the fair market value of an actual-delivered good.

for instance: Seller sells Buyer an antique tractor for \$30,000. The tractor is actually defective. The buyer keeps the tractor and sues for breach of contract. the jury then finds that the tractor as delivered, despite the defective condition, is still worth \$20,000, which is the fair market value of the actual-delivered good. They also find that had the tractor been delivered as it should have been, it would have been worth \$34,000 In this case, the liquidated damages for buyer would be \$14,000 dollars, which is the difference between the actual-delivered cost, and the perfect-delivered cost.

In a case where the seller breaches and keeps the goods, the buyer will get the: (1) Market price at the time of discovery of

the breach MINUS the contract price; or (2) replace price minus the contract price.

When the buyer breaches and has the goods, the seller can get the full contract price.

When the buyer breaches but the seller has the goods, the seller can get: (1) Contract price MINUS market price at time and place of delivery; (2) Or, Contract price MINUS resale price; and, in some situations, (3) Provable lost profits.

In Quasi-Contract, when one party benefited from another party's false promise, it is considered unjust enrichment. The damages are the benefit and value of service and materials received.

Liquidated damages are a monetary remedy.

When liquidated damages are unavailable, non-monetary remedies will be used as compensation. The most common non-monetary remedy is specific performance or injunction.

Equitable remedy such as specific performance is only used when legal remedies are unavailable.

For instance, contracts involving the sale of real estate, money is not a sufficient remedy for those who want to invest. It is that particular piece of land that the buyer wants.

Other times, it is about a contract for sales of unique goods like: (1) Antiques, (2) art; or, (3) Custom-made goods.

For example, a car would usually not qualify for specific performance, because it is not unique enough. However, if it is a car which has a heightened value because of its previous owner, such as President Teddy Roosevelt's standard touring car; then it is unique enough.

Equitable remedy is also often rewarded for contracts for services, but the reward is usually injunctive relief or Adequate Assurance of Future performance, because Specific performance for services contracts would amount to involuntary servitude which is violative of the 13th Amendment.

Another equitable remedy in this section is Reclamation. Reclamation is the right of an unpaid seller to get his goods back.

The key elements to reclamation are: (1) The buyer must have been insolvent at the time that he received the goods; (2) the seller demanded the return of the goods within 10 days of receipt; and, (32) the Buyer still has the goods at the time of the demand.

So, If Maestro contracted to sell his violin to Doofus, and the violin is delivered, but at the time Doofus received the violin his wife had left him and cleaned out his funds, before 10 days passes, Maestro demanded a return of the violin, and Doofus still had the violin at that time, Then Maestro may reclaim the good.

Rights of a good faith purchaser in entrustment.

If the owner leaves his goods with a person who sells goods of that kind, or a merchant, and that person wrongfully sells the goods to a third party, then such a good faith purchaser from the dealer cuts off the rights of the original owner or entruster.

This means that a good faith purchaser is not responsible for buying things from the wrong source, as long as the person whom he bought it from is a merchant who sells goods of that kind, otherwise the good faith purchaser would be liable.

Now comes Third party beneficiary problems.

The steps to approaching third Party Beneficiary problems.

In order to find a third party problem on the Bar exam you will need to: (1) Identify a problem as a third party beneficiary problem; (2) use the vocabulary of third-party beneficiary law; (3) Deal with efforts to cancel or modify a third-party beneficiary contract; and, (4) Figure out who can sue whom and lastly assert any available defenses.

The first step now then is to identify who the third party beneficiaries are. In order to do this, look for two parties contracting with the intent of benefiting a third party.

So, for instance, The scenario can be an insurance contract where Annette buys insurance from Billiard to benefit Annette's child Clara.

Third party beneficiaries.

A third party beneficiary is not a party to the contract, rather he can enforce the contract which others made for his benefit.

A promisor is someone who makes the promise that benefits the third party, and a Promisee is someone who obtains the promise that benefits the third party.

In general, only an intended Third party beneficiary has rights, whereas an incidental beneficiary does not have any rights to the contract.

Intended third party beneficiaries are named in the contract.

Intended beneficiaries are either: (1) donees; or, (2) creditors. Note that the most common case is that they are donees.

To distinguish between the two types of intended beneficiaries look to see whether the third party was a creditor of the promisee or just a named beneficiary.

The intended third party beneficiary's rights when dealing with efforts to cancel or modify the contract must be determined.

The test is whether the third party: (1) Knows of the contract; and, (2) Assents to the contract.

If the third party beneficiary has assented to the contract, his rights have vested and therefore the contract cannot be canceled or even modified without his consent. However, if the contract provides otherwise, he will be unable to do such.

Who may sue whom.

When an intended third party's beneficiary knows of and assents to the contract, the beneficiary can sue the promisor.

As in all other contracts, the promisee can sue the promisor. However, Donee beneficiaries cannot sue the promisee, whereas a creditor beneficiary may.

If the third party sues the promisor, the promisor can assert any defense that he would have been able to if he had been sued by the original promisee.

Thus, any defenses between the original two parties may also be used by the promisor when sued by a third party beneficiary.

Sometimes a party's rights can be assigned to another person. These kinds of questions are referred to as assignment of rights and delegation of duties, and they frequently appear on the bar exam.

Assignment of rights.

For Assignments look for a contract between only two parties, and one of the parties later transfers the rights but not the duties under the contract to a third party.

The terms that the bar exam uses are: (1) Assignor: Party who transfers the right to another; (2) Assignee: not a party to the original Contract, but is someone who can enforce the contract because of the assignment; and, (3) Obligor, another party to the contract.

The assignor assigns his rights to the assignee, and the obligor is the other party to the contract. There are, by necessity, some limitations on assignment.

The first place to look to is the Contract Provision. Different languages convey different things.

For instance, Language of prohibition such as "rights are hereunder not assignable" will take away the right to assignment, but not the power to assign, which means that the assignor is liable for the breach of the contract, but the assignee who does not know of the prohibition against assignment can still enforce the assignment.

On the other hand, language of invalidation like "all assignments are void" takes away both the right to assign and the power to assign so that there is a breach by the assignor and there are no rights in the assignee.

Under the Common law, even if a contract did not, in any way, limit the right to assign, it barred an assignment that substantially changes the duties of the obligor.

Thus assignment of the right to receive payment is permitted, but the assignment of other performance rights were not permitted.

For instance: Albert assigns his right to security Services to Bob so that Carl will now provide security services to Bob instead of Albert.

This is precluded under the common law because it substantially changes the duties of the obligor. What if Bob was a small baby who had no enemies, and Albert was the president of the United States? The security involved in such scenarios is very different between Bob, and Albert.

Furthermore, to have a valid assignment, language such as "I assign" has to be present. It would not be valid if it said "I will" or "I promise to assign". Additionally, consideration is generally not required.

With respect to the rights of the assignee; the assignee can sue the Obligor. The Obligor has the same defenses against the assignee as it would have had against the assignor.

Payment by the obligor to the assignor is effective until the obligor knows of the assignment, and Modification agreement between the obligor and assignor is effective if the obligor did not know of assignment.

Thus in a nutshell: (1) Assignee can sue the obligor; (2) Obligor has the same defenses against the assignee as he would have had against the assignor; and, (3) Payment by the obligor to the assignor is effective until the obligor knows of the assignment, and Modification agreement between the obligor and assignor is effective if the obligor did not know of the assignment.

In cases of multiple assignment; for example, if Albert assigns his right to Beta, and Beta assigns his right to Charlie. Who has what rights? In a gratuitous assignment, generally the last assignee wins. However, such a gift assignment may be freely revoked.

Revocation can be accomplished directly or indirectly by: (1) Bankruptcy; (2) death; (3) Assignor taking performance directly from the obligor; or, (4) making of another assignment.

Since the later gift assignment revokes an earlier gift assignment, without consideration, the last in time rule applies and the last assignee wins.

However, in a case of Assignment for Consideration, generally, the first assignee for consideration wins, unless: (1) A subsequent assignee takes priority over an earlier assignee for value only if he both: (a) does not know of the earlier assignment; and, (b) is the first to obtain: (1) payment; (2) a judgment; (3) a novation; or, (4) indicia of ownership.; and (2) Multiple assignments for consideration would be a breach of warranty.

In an assignment for consideration, the assignor makes a warranty that the rights assigned are assignable and enforceable.

Delegation of duties.

Delegation occurs when a party to the contract transfers the work and not the right under the contract to a third party.

For example, Pops contracts to Paint Onyx's house for \$1,000. Then Pops has a duty to paint and a right to receive payment, and Onyx has a duty to pay and a right to receive the painting of his house.

In general, contractual duties are delegable. However, the limitations are: (1) Contract prohibits delegations or prohibits assignments; (2) contract calls for a very special skill; or, (3) the person to perform the contract has a very special reputation.

For instance, Eddie Murphy was supposed to give the Oscar nominations host, in such a case he cannot simply delegate his duty to host the show to me. This is ultimately because the request was for Eddy and superficially for his special reputation and skills. Nevertheless he will not be hosting them because he was fired.

Essentially there is not a requirement for delegation. Consideration is not required, but there is no legal obligation on the delegatee unless there is consideration.

Most importantly, you do not need the consent of the other party to the original contract for delegation.

Finally, the consequence of delegation is that the delegating party remains liable, but the delegatee is liable to the obligee only if he receives consideration from the delegating party.

Criminal Law and Procedure

Homicide.

Homicide is the act of one human killing another human being.

Murder.

The first type of homicide which is seen on the Bar exam is Premeditated Murder.

Premeditated murder is the unlawful killing of a human being with malice aforethought which is premeditated deliberation.

Malice includes: (1) the intent to kill; (2) the intent to injure; or, (3) The intent to do serious bodily harm.

Premeditated deliberations simply a conscious deliberation over whether to kill or injure the victim.

For instance, Jack was in a planned fist fight. His objective, of course, was winning the fight, not killing his opponent. Nevertheless he winds up killin his opponent during the fight. This is still considered murder in spite of the fact that Jack did not plan for the killing to happen.

Usually, provocation is a sign of lacking premeditation because it implies that there was no time to deliberate.

Next is felony murder.

Felony murder is the unintentional killing, with serious or dangerous felony and foreseeable death.

Common felonies which are dangerous and have foreseeable death includes: (1) Burglary; (2) Arson; (3) Rape; (4) Robbery; and, (5) kidnapping.

Note that the defendant must be found guilty of the underlying felony in order to be guilty of felony murder.

All co-felons are guilty of felony murder if: (1) Death was foreseeable to them; and, (2) the only ones who are guilty are the ones to whom death was foreseeable.

Furthermore, felony murder cannot be based on felony assault or felony battery. This is known as the merger rule. Courts usually do not find felony murder, unless a fatal shot or act was fired or done by one of the felons.

The courts are most reluctant to find felony murder where the decedent is one of the felons.

Now comes depraved heart murder.

Depraved heart murder is an unintentional killing with reckless conduct involving extremely high risk of death.

Examples of depraved Heart Murder include: (1) Firing shots into a crowded area; (2) Firing shots into a passing train or a moving car; (3) Throwing a beer bottle at a person carrying a lighted oil lamp; (4) Playing Russian Roulette with another person; (5) Firing at a point near with no aim; (6) Driving a car at a very high rate of speed along a main street; (7) Shaking an infant so long that it can no longer breathe; and, (8) Throwing an object from the roof of a tall building onto a busy street below.

Now we consider Manslaughter.

Voluntary Manslaughter is the intentional killing with adequate provocation where a reasonable person would be provoked.

Voluntary manslaughter occurs in a heat of passion before the cooling period passes and provocation causes the defendant to kill the victim. Note that mere words alone are not enough, and any provocation longer than 30 minutes is too long. Furthermore, there should be no other motive.

There is also Involuntary Manslaughter. Involuntary Manslaughter is the unintentional killing in the course of committing a misdemeanor, or criminal negligence.

Examples of involuntary manslaughter include: (1) Assault and Battery which results in death; (2) Firing a bullet into a window of an abandoned cabin; (3) Driving a car at a high rate of speed or recklessly in an infrequently traveled country road; and (4) Throwing objects from the roof of a house located in a residential neighborhood.

For the Bar Exam, in order to determine whether the defendant caused the death of a victim, we need to examine three points:

(1) The victim must die within 1 year and 1 day from the date the injury was inflicted, or the death is deemed too remote to be considered a result of the cause (causation); (2) Factual causation exists if the victim would not have died BUT FOR the defendant's act; (3) Proximate Causation exists if the death results from the defendant's actions, even if in an unexpected manner, Unless the events are extremely unusual or a superseding event occurs.

With respect to superseding events; they are factors which are independent of the defendant's actions, are unforeseeable, and are the sole and immediate cause of death. Intervening events cannot break the chain of causation if it only contributes to the cause of death.

Another question which must be asked when analyzing whether this. Whether the defendant acted with malice.

The defendant acts with malice if he had the intent to kill or cause serious bodily injury. he also had malice if he had an awareness of the extremely high risk that death would result, or if he had the intent to commit a felony.

If the defendant acted with malice, it is murder UNLESS there was adequate provocation in which case it would be voluntary manslaughter.

Conversely, if he did not act with malice, then inquire as to whether the defendant either acted with criminal negligence or was the cause of death while committing a misdemeanor. If the answer is yes, then the defendant has committed involuntary manslaughter.

Failure to Act may lead to liability.

Failure to act will lead to liability if the defendant had a legal duty to act, based on criminal, tort, contract or other law. Thus, if the defendant was aware of the facts which gave rise to the duty to act, AND if the defendant had the necessary intent it will lead to liability.

For instance, if the defendant was a nurse in a hospital, and the patient died in the ICU during the nurse's shift. If the patient died because the defendant was preoccupied talking on the phone to her assortment of lovers, then the nurse is liable for her failure to act.

Now comes other crimes against persons.

Rape, or Sexual Assault.

On the Multi-state bar exam Rape can be defined as the sexual assault by a male with a female, who is not his wife, and without the woman's consent.

Note that the definition of rape may vary from state-to-state depending on the local rules, so be sure to look for distinctions in the question.

Also note that fraud will make consent void ONLY if it goes to the nature of the act and that fraud makes the victim falsely believe that what she consented to was not sex.

Kidnapping.

Kidnapping is either confining or restraining a person, or moving a person without the authority of law, when the victim of a crime, such as robbery or rape, is confined or moved during the crime; it will not be a kidnapping unless the confinement or movement increases the risk of harm to the victim.

So for instance, Angela was an attractive young attorney, however, she suffered a heart condition. During the night Albetras, an angry looking German who moved to the United States after his terror cell evaporated, followed Angela to her car, raped her, and then placed tight restraints on Angel's hands, threw her in the trunk of his car and started driving. Unbeknown to Albetras, the restraining of the circulation caused Angela to go into Cardiac arrest, but she didn't die from it. Nevertheless Albetras's actions with the confinement and movement increased the risk of harm to the victim.

Now comes property crimes.

Larceny is a crime involving theft. Larceny is the wrongful asportation and taking of the tangible personal property of another with the intent to deprive the person of it permanently.

The element of asportation, means removal of the property, can be satisfied even with a minor movement. Furthermore, the element taking simply means the exercise of control. It does not require the Defendant to remove the property from the premises.

So for instance, Larry Larson went to his friend, Simple Schmuck's house. When he was there he spotted Simple's new Robot phone. Larry always wanted a Robot phone, so he picked it up and put it in his pocket. Before Larry could make it out of the door, Leroy Enforcer, Simple's maternal uncle, and law enforcement officer, stopped Larry. Larry may be found guilty of larceny, even though he didn't actually remove the property from the premises.

Taking other's property wrongfully means taking without permission, or with permission obtained by deception, also called larceny by trick.

Thus in the Larry Larson example, if Larry told Simple that he needed to borrow his phone for a phone call, and Simple agreed, If Larry intended to deprive Simple of the phone, then that would be larceny by trick.

However, if Larry intended to return the phone then it is NOT larceny.

At the time of the taking, the defendant must intend to permanently keep the property himself, or do something with the property which would create a high risk that the owner would never recover the property.

For example, if Larry took the Robot phone and attempted to pawn it at Allfoney Telephone Tech store for \$1,000 dollars, or tried to sell it on Ebay; then Simple would risk never getting the Robot phone back.

Note that forming intent after the taking and during possession is sufficient only if the original taking was wrongful. So if Larry had taken Simple's phone without his knowledge or permission, with an intent to return it, but later decides that he needs cash to visit Polly Prostitute, then sells it..that would still be Larceny. Despite the fact that the intent was formed later, and when he still had possession This is because the initial taking was wrongful.

Now comes Embezzlement. Embezzlement is the possession of property under a trust arrangement whereby the defendant has the property already, but does something inappropriate with it. It could be a conversion of that property with intent to defraud. Furthermore, intent to return or replace the property will not show lack of intent to defraud. As they are both crimes

involving theft, larceny and embezzlement can easily be confused.

Summary of the differences between Embezzlement and Larceny.

In a case of employee theft, where an employee takes the company property that he has his hands on, if it were a lower level employee such as a janitor, or a truck driver, it is larceny.

On the other hand, if it were an upper management employee, such as a president or corporate officer, then it is embezzlement.

Thus, a truck driver might drive away with the intent to permanently take with him, a truck load of company product. This is larceny.

However, if a company president takes away shareholders' money that was entrusted to him, he is committing embezzlement. For instance, John Corzine may be found to have embezzled stocks from his now bankrupt corporation.

Thus: (1) A person who has possession of the property can commit embezzlement but not larceny; (2) A person who only has custody of the property can commit larceny and embezzlement.

Now comes the crime of False Pretenses.

False pretenses is obtaining title to personal property of another by an intentionally false statement of past or existing facts with the intent to defraud the other.

With respect to obtaining title or property from another. Unlike larceny, where the defendant only gets possession, in false pretenses, the defendant gets possession and the title.

With regards to means of misrepresentation. Note that failing to keep a promise is not misrepresentation UNLESS, at the time of making the promise, the defendant intended not to keep it.

Failure to correct a misunderstanding is misrepresentation if the defendant created the misunderstanding.

In order to commit larceny by false pretenses, the above mentioned must be past or existing fact and not a future fact, with intent to defraud.

Thus Crooked Camry offers to sell Dubious Doris a ruby ring, but Crooked Camry believed that the ring was really worthless red glass. If the ruby is worthless red glass Crooked is guilty, if not then she is not.

Now comes Receiving Stolen Property.

Receiving stolen property is taking possession of property acquired by theft, larceny or other property crime.

In the case of receiving stolen property, the property must actually have been stolen.

Thus, if an officer recovers the property, then the property is no longer stolen.

The receiver of stolen property must be aware that the property was stolen as of the time he received it, and he must have had intent to permanently deprive the property from the true owner.

Now Comes Robbery and Extortion.

Robbery is larceny where property is taken by force or assault. Force must be used to obtain the property or in order to prevent the victim from immediately regaining it.

By force means that the victim must resist the taking. There is no force if the defendant takes the item from a victim's pockets or hands where there is no resistance.

By assault means that threats must be used. The threats must be of immediate physical harm. The victim must be put in fear of harm, or the threat would cause fear in a reasonable person.

Assault and larceny merge into robbery, thus a defendant cannot be charged with larceny and robbery or assault and robbery as per the merger doctrine.

In order to properly count the number of robberies. It is one robbery per person, not per item taken.

Extortion or Blackmail is the obtaining of property by means of threats, Such as threats to do something other than physical harm or to use physical but not imminent harm, it involves threats which do not rise to the level of robbery.

Here's a Sample Question.

Derp rented a room for 2 nights at the Roach Motel. The room, like all others in the roach motel, was equipped with a large color television. Derp decided to steal the television, pawn it, and keep the proceeds. To conceal his identity as the thief, he contrived to make his room look as if it had been burglarized. However, he was traced through the pawnbroker and arrested. On these facts, What is Derp Guilty of? Embezzlement, False pretenses, Larceny, or Larceny by Trick?

The answer is larceny. While having mere custody of the television set, he carried it away from the hotel intending to permanently deprive the hotel owner of his interest in the set.

Now comes crimes against the home.

Burglary.

Burglary is the entry, by breaking, of the dwelling of another during the night, with the intent to commit a felony inside the structure.

the entry can be with any physical part of a person or an instrument such as putting a hand or a gun in a window.

If the defendant pries the window open with an instrument, and it slips and flies through the window, the defendant did not make an entry because the instrument was used to create an entry and not for committing a felony.

Burglary involves the breaking of another's dwelling. thus breaking means some force is used to create or enlarge an opening. the swelling of another is a place used for sleeping and one can break into any part of a dwelling.

For instance, one can break into a room containing rare tapestries, but one cannot break into a bed.

Burglary happens during the nighttime with the intent to commit a felony inside the structure. The intent has to exist at the time of the entry. If the intent is created after the entry, then you do not have a burglary.

Furthermore, the defendant does not need to carry out the felony to be guilty, and you do not have to prove that the defendant knew or thought it was a felony. You just need to show that the

defendant entered with the intent to commit an act, and that the act was a felony.

Note that in modern statute,s, burglary involves breaking of another's dwelling and another's automobile. Modern statutes also eliminate the need for breaking, eliminates nighttime requirement, and expands intent beyond a felony. Therefore under the modern statutes, burglary is basically the entry of someone's property with the intent to commit a crime inside the structure.

Now comes the crime of Arson.

Arson is a malicious aforethought or an awareness of a high risk of burning of another's dwelling.

Burning includes damage by fire to a part of the structure. Any size of burning will do and it does not require that the building be completely burnt down.

Note, however, that smoke or minor heat damage will not work ,because there has to be burning of some significance.

Arson also has to be the dwelling of another. Therefore you cannot arson your own harm, it is a legally impossibility. Furthermore, you cannot arson a commercial building unless someone lives in it.

Now we come to Parties to a crime.

In general all persons who commit the crime are primary actors and are guilty of a crime and persons who participate in the crime, either before or during its commission are aiders and abettors. They are also guilty of a crime. However, people assisting after the crime has been committed are not guilty of the crime. Furthermore persons who use an agent to commit a crime, will be guilty of a crime.

Thus, if Axe Murderer, goes to Physician Doc to receive treatment for a wound that Ace Murderer received, then Physician Doc cannot be held liable as aiding and abetting, because he helped after the crime had been committed.

Aiding and Abetting (Accomplices)

Aiding and abetting a crime makes that person an accomplice to a crime. A defendant is an accomplice when he has participated in

the offense and encourages or physically assists the primary actor. Mere presence is not enough, unless it was pursuant to an agreement to be present.

Again, participation after the crime has been committed is not enough to make a person guilty.

When a person is an accomplice, he has the required intent, which means that he knows about the primary actor's plan to commit the crime, and intends, or wants to encourage or assist the primary actor in doing so.

On the bar exam, look for the accomplice's motive for wanting the primary actor to succeed.

An aider and abettor can be convicted even if the primary actor has been acquitted. However, an aider and abettor is not guilty of the crime committed by the primary actor IF he is a member of the class of persons protected by the crime or the crime inherently involves several types of participants and only some are made liable.

Furthermore, a defendant is not guilty as an accomplice for accepting a bribe because bribery involves givers of the bribes and acceptors of the bribes, however only the giver is guilty. Moreover, he is not guilty as an accomplice for the sale of drugs if he is the buyer of the drugs.

Now we come to Inchoate Crimes.

The first major Inchoate crime is attempt.

For the crime of attempt, a person must do something constituting a substantial step towards commission of the crime with intent to commit that particular crime.

When interpreting doing something that constitutes a substantial step towards committing a crime, mere preparation such as getting or assembling material is insufficient.

The intent to commit a crime must be the intent to complete the act which is needed for the attempted crime to be completed.

A defense for inchoate crimes is legal impossibility, where the defendant thinks he is committing a crime, but he is mistaken about the law because his conduct is not a crime.

Abandonment of attempt and factual impossibilities are not defenses.

Factual impossibilities include: (1) A defendant mistaking his ability to perform the conduct; (2) Mistaking the result he intends to cause because it is impossible; (3) Or, a defendant was mistaking circumstances, which if they were as he believed would be against the law.

For example, the defendant would be found guilty for attempted murder for shooting at a hole in the roof, believing his victim to be there, and indeed the victim had been there only moments earlier, but was not at the time of the shooting.

The next major Inchoate crime is Solicitation. Solicitation means the request that someone commit a crime with the intent that they commit it together. It is still a crime even if it is immediately rejected, or if the solicitation could not be successful. There are no defenses, once you make the request, it is solicitation and you have committed a crime.

Conspiracy.

Conspiracy is when a person enters into an agreement to commit a crime with the intent that the crime be committed and an overt act is taken in furtherance thereof by one member of the group.

The co-conspirator rule states that all members are held liable for all foreseeable crimes committed by other members in furtherance or course of the crime.

Unlike attempt and solicitation, conspiracy does not merge into one completed crime.

Thus, a defendant can be charged with both conspiracy to commit murder and murder.

Withdrawal is not a defense to a crime of conspiracy.

A person cannot withdraw from a conspiracy once he has entered into an agreement.

There is a defense, however, that is valid to subsequent crimes committed by co-conspirators, if the co-conspirator gives notice to all other members before the crime is completed. Moreover, when there is no meeting of the mind and acquittal of co-

conspirators occurs, then no meeting of the mind can be used as a valid defense to conspiracy because there is no agreement.

The defendant will be acquitted if all other co-conspirators have been acquitted by: (1) Acquittal; (2) Not guilty by reason of insanity; or, (3) a person did not intend to go through with the crime.

For instance, a person did not intend to go through with the crime if he is part of a secret reservation such as an undercover agent.

Now we come to general principals of criminal law and procedure on the MBE.

The MBE General principals of criminal laws covers 40% of criminal law and procedure.

Acts and Omissions.

Usually, a person needs to act a certain way and have a state of mind to commit a crime. And ordinarily, an omission of an act does not lead to criminal responsibility unless it violated a legal duty to act.

Legal duty examples include: (1) Contractual Duty: If an amusement park roller-coaster operator was intoxicated, and failed to notice that the tracks were damaged, and fell asleep on the job and the passengers fell to their death, he would be guilty of manslaughter.

(2) Parent-Child Relationship: If the defendant failed to check on their child, and to provide food and water for him, and he died of malnourishment, then the defendant is guilty of an omission.

(3) Duty taken on voluntarily: A defendant voluntarily taking on the duty to care for his elderly cousin, who is also mentally incompetent, and he finds the drain-o, which was left out by the one who was supposedly caring for him, and drinks it down and dies, this would be improper care, and the defendant would be found guilty.

(4) Official Duty: The defedant was a police officer who witnessed an assault take place. The Officer continued to eat doughnuts and did not intervene and because the doughnut was so-good he failed to summon help. he is guilty of the victim's

injuries because of his failure to act as a police officer.
(Although he is not guilty of being a glutton).

(5) Duty which arises because the Defendant has set in motion the chain of events. If the defendant was a squatter staying in a house which was being renovated. He fell asleep while holding an oil lamp, and set fire to the room he was in. Instead of putting the fire out, or even calling for help, he moved to another room to sleep. The defendant is guilty of arson.

State of mind.

The required mental state. Mental state simply requires that the defendant must be aware of the facts that make it a crime in order to form intent.

There are four levels of awareness: (1) purposefully, or a conscious desire; (2) Knowingly, the awareness of a practical certainty; (3) recklessly, which means awareness of a substantial risk. If the statute is silent as to which level applies, then recklessness applies; (4) negligently, this means a reasonable person would have been aware of a substantial risk or should have known.

Note that almost all crimes need a state of mind except for strict liability crimes.

For instance, statutory rape does not require knowledge of the victim's age. Also, bigamy does not require knowledge that it is a second marriage.

Other regulatory crimes also do not need a mental state or any awareness to make the defendant liable.

Now we move to defenses for crimes overall.

The first defense is ignorance or Mistake of fact. For general intent crimes such as arson, and rape, as well as others, it is valid if reasonable mistake of fact shows that the defendant lacked the intent required to commit the crime.

Conversely, for Specific Intent Crime such as property crimes and any other offense requiring "with the intent to", ignorance or mistake of fact is a defense if unreasonable mistake of fact shows that the defendant lacked the specific intent required for the crime.

Mistake of law is NOT a defense UNLESS the Belief was reasonable AND the defendant relied upon one of the following three conditions: (1) The statute was later held invalid; (2) The Judicial decision was later overruled; (3) Or, the official interpretation of the law by a public official.

Generally, relying on an attorney is not enough. the defendant is still guilty UNLESS the statute requires that in order for it to be a crime, defendant must know the law is being violated, knowing the legal obligation to do so or "willfully".

Furthermore, if the crime requires awareness of the law, even unreasonable ignorance or mistake of law that demonstrates a lack of awareness will require an acquittal.

Responsibilities.

Under certain circumstances, a defendant may be guilty for his crime but have diminished responsibilities for them.

The first situation is when the defendant has a mental disorder. There are 4 different methods in determining whether a person has a mental disorder.

(1) M'Naghten, which states that mental disorder exists when a disease of the mind caused defect of reason such that the defendant lacked the ability at the time of his actions, to know the wrongfulness of the actions or to understand the nature and quality of his acts or simply his cognitive capacity.

Using this test, you need to ask the question whether the defendant had a delusion or false belief, and could he have done the crime if his beliefs were true? Thus an inability to control himself is not a defense under M'Naghten.

(2) Irresistible Impulse Test; states that because of a mental illness, the defendant could not control his actions or conform his conducts to the law. Suddenness is not required.

(3) Durham Test; states that the conduct was a product of the mental illness, when the defendant would not have committed the crime BUT FOR the disease.

(4) All Model Penal Code; This is a combination of M'Naghten and Irresistible Impulse Test.

The Model penal Code recognizes mental illness when, due to the mental disorder or defect, the Defendant lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

On the bar exam: (1) First assume that the situation was as the defendant perceived it to be; (2) Under those circumstances, would the defendant have been legally entitled to do what actions he did?; (3) If the answer is yes, then he is acquitted under the Model Penal Code.

Note that you do not consider the defendant's inability to control his actions. His loss of control, however, may be a defense under the Model Penal code OR Irresistible Impulse of Insanity.

Intoxication is another situation where the defendant may be guilty of the crime, but receives diminished responsibility therefrom.

Intoxication can be divided up into: (1) Voluntary intoxication; and (2) Involuntary intoxication.

Voluntary intoxication is a defense when the defendant should be acquitted only if it is a specific intent crime, and the intoxication shows that he lacked the specific intent.

the Modern Approach says acquittal allowed if the crime require a mental state higher than recklessness, meaning that the crime requires purposefully and knowingly committing the crime.

The minority approach says that voluntary intoxication is not a defense and it is NEVER a defense to general intent crimes.

In the context of Homicide, voluntary intoxication defense can disprove premeditation and reduce 1st degree murder to 2nd degree murder but it CANNOT reduce murder to manslaughter.

Involuntary intoxication occurs when the defendant did not know that a substance was intoxicating or when he consumes the substance under duress and then commits a crime. It is treated as insanity and the M'Naghten test applies.

Causation.

On top of act, state of mind, and responsibility, to be guilty, a defendant's act has to be the proximate cause of the crime in

question. Even when all the elements are satisfied a defendant may still be excused.

Justification and Excuse.

The first defense is necessity or choice of evils defense. This is used if the defendant reasonably believed that committing the crime would prevent an imminent threat of harm AND the defendant charged with escape is likely to have a necessity only if he attempted to surrender to authorities as soon as the immediate threat was over.

The defendant must reasonably believe that this harm would be greater than the harm that would result from committing the crime.

Necessity of choice or evils is not a defense if the defendant wrongfully created the situation making the choice necessary, or if the defendant killed another to avoid his own death.

The second defense is Duress or Coercion. Where the defendant is forced to commit a crime by threat that if he did not do so, the threatening person would do immediate and physical harm to the defendant personally or to a third person.

Duress is not a defense to an intentional murder BUT is a defense to a felony murder.

The third defense is Self Defense.

It is valid if the defendant reasonably believed, objectively, that he was in imminent danger of being harmed by another and the force he used was necessary to prevent the threatened harm.

If the defendant used deadly force, he must show that he reasonably believed that he was threatened with imminent death or serious bodily injury AND that deadly force was necessary to prevent the harm.

Under the majority rule, there is no duty to retreat for self-defense and opportunity to retreat is only considered as a factor in determining whether deadly force was reasonable.

On the other hand, under the minority view, the defendant has to retreat before using deadly force UNLESS retreat was not safe OR the defendant was attacked in his own home.

Note that the aggressor is the person who starts a fight.

An aggressor cannot use force in self-defense during the fight UNLESS they regain the right to self-defense by withdrawing from the fight OR giving notice of an intent to do so.

There is an in between stage called the imperfect Defense whereby the defendant is charged with murder who unreasonably believed that the killing was necessary in self-defense but is not entitled to acquittal and should be convicted of manslaughter rather than murder.

The fourth defense is defense to others. This can be used as a defense if the defendant reasonably believed that another person was threatened with imminent harm and he reasonably believed that force was necessary to prevent the harm.

The fifth defense is Defense of property. The defendant can use force if he reasonably believed that it was necessary to prevent unlawful interference with real or personal property.

For the defense of property, however, the defendant cannot use deadly force. The force can only be used to prevent the interference and the force cannot be used to regain the property UNLESS the property was in immediate pursuit.

The sixth defense is Unconsciousness. This is a defense because an act such as killing someone during sleepwalking will lack the mental state to commit the crime.

The seventh defense is entrapment. Under the majority rule, entrapment occurs if the defendant was not predisposed to commit crimes, and the police officers created the intent to commit the crime in the defendant's mind.

The test is subjective to the defendant's intent. Under the minority rule, entrapment occurs if a police officer causes a reasonable and unpredisposed person to form the intent to commit the crime. The test is objective to the defendant's intent as it is based on a reasonable person standard.

The last general principal that applies to all criminal law is jurisdiction.

When a criminal case involves a violation of federal law, the federal courts will have jurisdiction.

When a criminal case involves a violation of state law, the state courts have the power and authority to handle the case.

Where a case begins depends on where the alleged crime was committed and whether it was a violation of state or federal law.

Constitutional protection of accused persons.

Baseline protections that the United States constitution requires for those accused of crimes. is the overview of the discussion. Some people refer to this section as Criminal Procedure. Note that about 40% of the criminal law and procedure questions will be from this section.

Arrest, Search, and Seizure.

Only the person whose right is being violated has a standing. Thus, a passenger of a car which has been stopped illegally will have standing to complain about a search and seizure. If it was stopped legally then the passenger will not have such a right.

The search and seizure process is a part of the Fourth Amendment. The first question to ask is whether the Fourth amendment is invoked.

To invoke a Fourth Amendment right, a person needs a state action or a governmental conduct.

Governmental conduct includes actions such as: (1) Public Police (paid by public); (2) Private individual acting at the direction and control of public police; (3) Or a privately paid police who is deputized with the power to arrest (College cops!).

Remember, the defendant must have a reasonable expectation of privacy. There is no reasonable expectation of privacy when you have no standing.

this is a good segway to standing itself. A person has automatic standing if he owns the premises being searched, or if he lives on the premises being search, or if he is an overnight guest with a reasonable expectation of privacy within the premises being searched.

Furthermore, a person may or may not have standing if he owns the property being seized, or if he is legitimately present when the search takes place.

Here are some of the typical scenarios encountered on the MBE:

(1) An overnight guest usually has reasonable expectation of privacy and standing; (2) A passenger in a car does not have standing to object to the search of the car, unless the car was stopped illegally; (3) And an individual on the premises of someone else for the purpose of illegal business, such as selling drugs will not have standing to object to the search of the premises.

There is no reasonable expectation of privacy when something is being held out to the public. This includes the sound of a voice, a person's handwriting style, paint outside of a car, bank account records held by a bank; monitoring your car in public or in your driveway, anything seen across open fields; and anything seen over public air space, odors from luggage at the airport, garbage set out on the curb and such.

the second question related to the search and seizure process is whether the police had a search warrant.

if the answer is yes, test its validity with the search warrant law. The warrant should issue on showing of probable cause. In this case, hearsay and tips from an anonymous informant may be used by the police officers.

A warrant must be precise on its face, which means it must state, with particularity, the place to be searched, and the evidence to be seized. Moreover, a warrant must be issued by a neutral magistrate detached from law enforcement. Such as a court clerk.

If the answer is no. Then the police officer does not have a search warrant, then try the good faith defense. And if that is no. Ask whether it fits within an exception.

There are six exceptions : (1) Search incident to a lawful arrest. This simply means that the arrest was lawful, and the search was contemporaneous in time and place with the arrest. In this case, only the person and his wingspan can be searched. When someone is validly arrested in a car, their wingspan is the entire interior of the car but not its trunk.

(2) Automobile exception: where the police need a probable cause . If the police has a probable cause, he can then search the car and the trunk of the car. he can also search packages and containers where the evidence might reasonably be. this includes

items of the passengers in the car. Keep in mind that probable cause can arise after the car is stopped, but not after someone is searched.

(3) Plain view; where the police must be legitimately present and see the evidence in plain view.

(4) Consent; to be a valid consent defense, it must have been voluntary and intelligible. If the police officer lied about having a good warrant, then the consent is negated. The police officer does not have to warn a person about his right not to consent, and if 2 or more persons have an equal right to the property, either of them can consent to its warrantless search.

(5) Stop and Frisk, where the police must have reasonable suspicion to stop. If the police reasonably believe that the defendant may be armed, he may frisk, and if the officer feels something, he can then search. Pursuant to the plain feel doctrine, the police may seize not only weapons discovered in a Terry Stop, but also contraband when the nature of such is immediately apparent to the officer. An officer must not, however, seize such contraband if its identity is not immediately apparent to the officer upon administering the frisk.

the sixth and last exception is hot pursuit or Evanescent evidence, which means that the evidence might go away. Examples of such would be: (1) scraping under a defendant's fingernails; and (2) Hot pursuit must be of a fleeing felon. If the officer is in hot pursuit, they can enter anyone's home in doing so.

Fourth Amendment Rules to Remember: (1) All wiretapping and eavesdropping requires a warrant. However, everyone must assume the risk that the person they are talking to will consent to be wired; (2) Consent to Search a Home can only be given by someone with an equal right of control such as a roommate; (3) regarding electronic communications such as e-mails and instant messages at work. The Majority believes that employees do not have a reasonable expectation of privacy when it comes to their work related electronic communications. However the minority acknowledges that an employee has a right to privacy in his workplace computer. However, the minority also found that an employer can consent to any illegal searches and seizures.

Confessions and privilege against self-incrimination.

Self-incrimination can occur either directly or indirectly. Directly is by means of interrogation where information of a self-incriminatory nature is disclosed, and indirectly, when information of a self-incriminatory nature is disclosed voluntarily without pressure from another person.

The Fifth Amendment protects witnesses from being forced to incriminate themselves. Anyone can assert the Fifth Amendment privilege in any case.

The privilege must be claimed in civil proceedings to prevent the privilege from being waived in the subsequent criminal prosecution.

Once a criminal defendant has asserted his right to have an attorney present, further interrogation in the absence of the attorney makes any incriminating statements by the defendant inadmissible.

A statement made in response to a custodial interrogation of a suspect is admissible against him only if, after being advised of his Miranda rights, he makes a voluntary and intelligent waiver.

About Miranda warnings, the person in custody must, prior to the interrogation, be clearly informed that: (1) He has the right to remain silent; (2) And that anything he says may be used against him in a court at law; (3) The person must be clearly informed that he has the right to consult with an attorney, and to have the attorney present during questioning; (4) that, if he is indigent, an attorney will be provided at no cost to represent him.

Regarding the scope of the fifth amendment, the state can take hair, blood, and urine samples, however, the fifth amendment does not allow the state to perform polygraph tests or custodial police interrogation without the proper criminal procedure.

During trial it is unconstitutional for the prosecution to make a negative comment on the defendant's failure to testify or the defendant remaining silent upon his hearing of Miranda rights.

There are times when the 5th Amendment privilege is eliminated.

First, when the government gives an individual immunity, that individual may be compelled to testify. The immunity may be transactional immunity or use immunity. Transactional immunity

is when the witness is immune from prosecution for offenses related to the testimony.

Use immunity is when the witness may be prosecuted, but his testimony may not be used against him. The use immunity must extend not only to testimony made by the witness, but also to all evidence derived therefrom. This scenario most common arises in cases related to organized crime. States can still prosecute from evidence obtained before the immunity was granted.

Second, if there is no possibility of incrimination, then the fifth amendment privilege is also eliminated.

For example, when the statute of limitations has run on a crime, it is impossible that the defendant can be prosecuted. Consequently, the fifth amendment does not bar the state from using the defendant's testimony even when it is obtained without a proper criminal procedure.

The third scenario is when the defendant waives to all legitimate subjects of cross examination. In this situation, the fifth amendment privilege is eliminated. Remember, even after asserting his right to counsel, a defendant may waive the right by making incriminating statements during a discussion which he himself initiates.

Lineups and other forms of identification.

Because of the possibility that manipulation of the circumstances of a lineup will result in a likelihood of inaccurate identification, the court has held that after the filing of formal charges against him a prisoner is entitled to the presence of counsel at a lineup.

Right to counsel.

Once a defendant has asserted his right to terminate the interrogation and requests and attorney, re-initiating the interrogation by the police without the defendant's attorney present violates the defendant's Sixth Amendment right to counsel.

The Sixth Amendment right to counsel is triggered when someone upon hearing Miranda warnings asks for an attorney This right to counsel is not offense specific.

Right to fair trial and guilty pleas.

A fair trial consists of a fair preliminary hearing and a fair trial.

Our constitution guarantees the accused a preliminary hearing to determine the probable cause of being prosecuted.

Both the plaintiff and the defendant have a right to counsel and can perpetuate tests.

Charges involving capital or infamous crimes under federal jurisdiction must be presented to a grand jury, under the Fifth amendment.

Misdemeanor offenses, however, can be charged by the prosecutor's information.

Unlike the trial itself, exclusion does not apply to grand juries because the grand jury's proceedings are secret. The defendant and his counsel are generally not present for other witnesses' testimony.

In a trial, the accused has the right to an unbiased judge. A judge is biased if he has any financial interest in the case or malice against the accused. The accused also has the right to jury trial. In a jury trial, a minimum of six jurors is required.

If there are only six jurors, then the verdict has to be unanimous to be valid. There is no federal constitutional right to a unanimous verdict when the jury consists of 12 or more people.

Also, defendants have a right to cross-section of the community; 6 jurors were found to be sufficient to provide a good mix of people, or cross-section.

Both the defense and the prosecution have the right to peremptory challenge or the right to reject a certain number of potential jurors who appear to have an unfavorable bias without having to give any reason. However, it is unconstitutional to exercise peremptory challenges to exclude from jury based on race or gender. That is known as a Batson challenge.

In a fair trial, even if the defendant had a counsel, that does not mean the right to counsel has been satisfied. For example, a counsel may be ineffective.

There is an ineffective assistance of counsel when the counsel's conduct was deficient, and but for such deficiency, the result of the proceeding would have been different. if such is not the case, then the defendant does not have an ineffective counsel, and the relief will be denied.

The next topic is Guilty Pleas and Plea Bargaining.

The court will not disturb guilty pleas after sentencing. Furthermore, the contract theory of plea bargaining holds the parties to the bargain. Taking the plea involves the following results.

if the defendant says that he is guilty, it is no on the record. Further, the judge will address the defendant personally. he will tell the defendant that the nature of the charge is what it is, and inform the defendant of the maximum sentence and the mandatory minimum sentence of the offense.

the judge will also inform the defendant that he has a right to plea not guilty. If the defendant pleads guilty, there will be no trial and only the sentencing phase will occur. If the judge failed to inform the defendant anything mentioning the above, the defendant's remedy is to plea again.

Under limited situations, the defendant can withdraw a guilty plea after sentencing.

For example, the plea was involuntary, there was a lack of jurisdiction by the court taking the plea, there was an ineffective assistance of counsel, or there was a failure of the prosecutor to keep an agreed upon plea bargain. That last situation is the one most commonly encountered on the MBE.

Next comes Double Jeopardy. Double jeopardy is a procedural defense that forbids a defendant from being tried twice for the same crime on the same set of facts. If the final judgment is on a lesser included offense, it bars the prosecution of a larger offense unless the larger offense was not in existence at the time.

For instance, defendant is acquitted of attempted murder, and then the victim dies. The defendant can now be charged with murder because at the time of the prior trial, murder did not exist.

the only exception is called separate sovereignty exception. This means that a defendant can be prosecuted for the same crime by both the state and federal governments or by two or more different state. res Judicata or issue preclusion does not apply to criminal cases. It only applies to civil matters.

Cruel and Unusual punishment. The eighth amendment states that persons will not be subjected to arbitrary, humorous, or capricious punishment, outside the normal course of the law, such as tar and feathering. While the modern rule considers capital punishment per se to be a cruel and unusual punishment. So what? This is Texas, and it is proof that the modern rule with respect to that is not followed.

Burdens of Proof and persuasion.

In criminal law, the burden of Proof is on the prosecution, which has to convince the court that the accused is guilty beyond a reasonable doubt.

The Burden of Persuasion is an obligation that remains on prosecution for the duration of the claim. Presumption of innocence states that no person shall be considered guilty until finally convicted by a court. It places the legal burden on the prosecution to prove all elements of the offense and to disprove all defenses.

Evidence

Presentation of Evidence.

When introducing evidence from a witness, the witness needs to be competent.

To be competent, the witness has to have personal knowledge about the subject of his testimony.

In other words, the witness must have perceived something with his own senses, that is relevant to the case confirmed under oath.

Generally, a witness cannot read from a writing in aid of oral testimony.

However, to get the entire story, a direct or cross examiner may attempt to refresh a witness's present recollection by showing the witness physical objects or writings.

For instance, Fanny Forgetful forgot the name of her Gardner who was also her lover. If her husband was on trial for killing the Gardner, and she claims that she cannot remember the Gardner's name, then the examining attorney may use any physical object or writing, if the purpose is to refresh the witness's recollection, rather than exposing the item to the jury then any item may be used.

However, before refreshing items may be used, the witness must have exhausted her unrefreshed memory. So long as it is first shown to opposing counsel and marked as an exhibit. This is called the "Refreshing Recollection Exception". Furthermore, the material used to jog the witness's memory cannot be read to the jury.

When evidence is submitted without showing its admissibility, the other party may make an objection and state their grounds for the objection. The party being objected to can then make an offer of proof.

An offer of proof is the party's explanation to the judge, as to how the subject of the objection would be admissible under the rules of evidence. The basic prerequisites of admissibility are: (1) Relevance; (2) materiality, and, (3) Competence.

Evidence is relevant when it has any tendency, within reason, to make the fact that it is offered to prove or disprove, either more or less probable than it would be without the evidence. Furthermore, evidence is material if it is offered to prove a fact that is at issue in the case at bar.

For example, the defendant is charged with murder. The prosecutor offers testimony proving that the defendant like to gamble in order to shine a negative light on the defendant. If there is no connection between the victim and the defendant's gambling habit, then the evidence is immaterial. Evidence is competent if the proof that is being offered meets certain traditional requirements of reliability.

Generally, a person who is not testifying as an expert is allowed to testify in the form of an opinion if the opinion is both: (1) Rationally based on his perception; and (2) helpful to an understanding of his testimony.

Lay witnesses cannot, however, draw legal conclusions such as stating that a party was or is negligent.

A person is presumed to be a competent witness unless the court determines that the witness is incapable of communicating either directly or through interpretation by another, or that the witness is incapable of telling the truth.

A party can seek permission by the court to introduce evidence as fact if the truth of that fact is so notorious or well known that it cannot be refuted. This order is given as judicial notice.

It is also important to distinguish the roles of judge and jury.

In a trial the judge ensures that the proper procedure is followed. Whereas the jury decides whether the evidence proves facts sufficient to satisfy the requirements of law as charged by the court. In other words, the judge decides what can be the evidence from which the jury decides the verdict.

When evidence with limited admissibility, which is admissible for one purpose but inadmissible for another, is admitted, the judge can, upon request, restrict the evidence to its proper scope and instruct the jury accordingly. Any party may impeach any adverse deponent by self-contradiction without foundation.

Now we come to presumptions.

A presumption is an imposition of a burden of proof on a party to go forward with evidence to rebut or meet the presumption.

When evidence introduced leads to a presumption of fact, the other side has the burden of going forward to rebut that presumption. If they do not, the presumption is left intact.

the invocation of a presumption will normally shift the burden of proof from one party to the opposing party during a court trial.

There are two types of presumptions or burdens of proof: (1) Burden of going forward; and, (2) Burden of Persuasion.

With respect to the Burden of going forward; At any given time, one party is obligated to produce evidence regarding a claim or defense. For example, in a hypothetical civil case where one

element of the claim is that there was snow over night on a given night. The plaintiff introduces evidence that the ground was frozen the next morning, which creates a presumption that it snowed the night before.

The defendant must then rebut this presumption with other evidence. Perhaps with an eye witness who says that it was not snowing that night; or with evidence that a truck had dumped water onto the ground over night when there were freezing conditions.

If a preponderance of the evidence disproves the presumption, then the bubble bursts, and the presumption is lifted, thereby precluding the jury from the presumption that it snowed that night. However, if the evidence is insufficient, then the jury may make the presumption.

With regard to the burden of persuasion. Beyond a reasonable doubt is a fine example of a burden of persuasion. Also, unlike the burden of going forward, the burden of persuasion never shifts.

For example, if the defendant raises an affirmative defense, the prosecution must persuade the jury beyond a reasonable doubt that the defense is invalid.

On the bar exam, you often need to be able to identify what presumption the party is trying to prove or rebut, to know if the evidence in question is relevant and thus admissible.

Now we go to Mode and order.

the court must exercise reasonable control over the mode and order of interrogating witnesses and presentation of evidence so as to make the presentation and interrogation effective for the ascertainment of the truth and to avoid needless consumption of time, as well as protecting witnesses from harassment or undue embarrassment.

Under mode and order, the scope of examination is also a common issue.

While direct examination should be limited to relevant and material information, Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Cross examination is bound by the answers given by the witness on collateral matters and

cannot use extrinsic evidence to contradict the witness and is bound by the answers given by the witness on collateral matters, and cannot use extrinsic evidence to contradict the witness on collateral matters.

Extrinsic evidence is anything other than cross examination and collateral matters are matters relevant only to contradict the witness.

There are different rules for the forms of questions asked in direct and cross examinations.

Direct examination should not have leading questions such as "You're not guilty correct?".

Conversely leading questions are allowed on cross examination whenever the party calls a hostile witness. A witness is hostile when ever it is associated with the opposing party or is against the point of view of the attorney who is leading the examination.

At the request of a party, witnesses may be excluded so that they cannot hear the testimony of the other witnesses.

this rule does not authorize the exclusion of a party who is a natural person due to the fact that the Due Process clause prohibits that. Further more an officer or employee of a party who is designated as his representative may not be excluded. Neither may a person whose presence is shown by a party to be essential to the presentation of the party's cause. neither may a person who is authorized by statute to be present. Even when a witness is admitted to testify, he can still be impeached, and even after that, he can be rehabilitated.

Impeach contradiction and rehabilitation.

Any party can impeach a witness, even if it is that party's own witness.

the most common grounds for impeachment are: (1) Inconsistent statements and conduct.

Prior inconsistent statements are not hearsay when the witness testifies at the trial, and is subject to cross examination, and gives the prior statement under oath while being subject to perjury.

In order to impeach a witness based on inconsistent statements and conduct, even extrinsic evidence is permitted if the statement is relevant to an issue in the case.

If extrinsic evidence is used, then the witness must be given an opportunity to explain or deny the prior inconsistent statement.

(2) Witness's bias and interest. The witness's bias and interest is also subject to cross examination. Extrinsic evidence is also permitted if the counsel first asks about the bias or interest.

(3) Conviction of a crime is another ground for impeachment which is subject to cross examination. Any crime involving dishonesty and any felony can be used for impeachment purposes. However, conviction for a crime more than 10 years old is inadmissible unless sufficient advance written notice of the intent to use is given to the adverse party with a fair opportunity to object to such use.

(4) Specific acts of deceit, lying, or no conviction. this ground for impeachment is valid only if good faith is used on cross examination.

Good faith is reasonable basis for believing that the witness did the deceitful act, where acts are probative of truthfulness. Note that no extrinsic evidence is permitted in this ground but there is also no foundation requirement.

(5) character for truthfulness.

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but it is subject to the following limitations: (1) The evidence may refer only to character for truthfulness or untruthfulness, and; (2) Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(6) ability to observe, remember, or relate accurately.

Generally courts consider attacks on a witness's ability to observe, remember, or relate accurately as a form of impeachment separate from bias.

(7) Impeachment of hearsay declarants.

Impeachment of a hearsay witness, whose hearsay is admitted at trial, can be done by any method.

Rehabilitation of impeached witnesses. After a witness is being impeached, he can be rehabilitated.

Generally, character evidence is not allowed. However, after a character attack, a witness's good reputation for truth after such attack can be used to rehabilitate a witness.

Unlike prior inconsistent statements in an impeachment, prior consistent statements are generally inadmissible to rehabilitate.

Prior consistent statements are admissible, however, to rebut an express or implied charge that the witness has a motive to lie or exaggerate when the statement is a pre-motive statement and the previous statement is a substantive evidence of its truth.

Relevancy and reasons for excluding relevant evidence.

Probative value.

Evidence is usually admissible if the probative value outweighs its prejudice. The probative value is measured by evaluating the evidence's relevance and prejudice. .

Evidence is relevant if it has any tendency to make the material fact more probable or less probable than it would have been without that evidence.

The general rule is that the evidence must relate to the time, event , or person in controversy.

An exception would be similar occurrences. Similar occurrences not relating to the time, event, or person in controversy can be relevant.

Examples demonstrating similar occurrences which do not relate to the time, event , or person in controversy which are relevant would be; when there is a complicated issue of causation, the plaintiff can show that six non parties got sick at the same time at the same place in order to show that what they have in common is the cause of injury.

Prior accidents or claims of the plaintiff may be relevant in order to show a common plan or scheme to defraud, and will be

relevant to show that damages to the plaintiff are caused by something other than the current damage.

Prior accidents or claims which involve the same instrumentality may be relevant only if it occurred under: (1) The same; (2) similar circumstances.

If so, then it is relevant to show notice or knowledge by the defendant that the instrumentality is dangerous. It is also relevant to show that the instrumentality itself is dangerous.

For instance, showing a history of sexual discrimination can show that the defendant had a motive for not hiring the plaintiff which was based on gender.

Note also that comparable sales to establish value example. Sale price of other chattels or parcels of real property is a good demonstrator of the value of the subject matter. Of course, the matters used must be: (1) The same kind; (2) The same place; and (3) The same time.

Now comes the exclusion of unfair prejudice, confusion, or waste of time.

Basically, the evidence will be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion, or waste of time.

Authentication and Identification.

Before the evidence is shown, the proponent has to prove that the evidence is what it claims to be.

Character and related concepts.

Generally, character evidence is inadmissible. The rules are different in civil and criminal law. Character evidence is inadmissible by either party to prove conduct but admissible if a party's character is directly at issue in a civil case.

For example, when the claim is : (1) Defamation; (2) Negligent hiring; or (3) Negligent entrustment, a person's character is directly at issue and thus evidence for their character is admissible.

If the parties Characters are directly at issue, the party can prove their character by supporting: (1) Specific acts; (2)

Opinion testimony of witnesses; (3) And reputation in the community.

In criminal cases, character evidence is inadmissible if initially offered by the prosecutor to show that the defendant has a propensity to commit crimes. It is admissible, however, if it is offered by the defendant to show that his character does not adhere to the crime charged.

The Defendant can call a witness to testify, but he is limited to opinion or reputation testimony and cannot testify regarding specific acts.

The Prosecution can rebut by: (1) Cross examining the defendant's witness; or, (2) By introducing its own character witness.

In a criminal case, evidence regarding party's character is also admissible if the defendant puts the victim's character at issue.

For example in a homicide or assault case, the victim may claim self defense (or the defendant in the homicide case), the character evidence may be offered to show that the victim was the aggressor.

Note that this evidence is limited to reputation or opinion. The prosecution can rebut by showing the good character of the victim or the bad character of the defendant regarding the same trait as the victim.

The same rules do not apply, however, in rape cases because the victims of such cases are protected.

In both civil and criminal cases, character evidence may be admissible if it is given by using specific acts of misconduct.

Naturally, it has to be relevant to some issue other than character such as motive; intent; mistake or absence thereof; identity; or common plan or scheme. It is helpful to remember the word MIMIC to apply this.

Probative value must not be substantially outweighed by the danger of prejudice etc.

The defendant's prior bad acts of sexual assault or child molestation are admissible when used in the cases mentioned above. (that is mimic).

it is important to distinguish character evidence from habit and routine practice.

Using a person's prior acts to demonstrate that he has a violent or deceitful character is different from showing a person's habit.

Habit and routine practice is admissible because habits are presumed to be relevant to show that an individual acted the same way on the occasion in question. This admissibility applies to habit of a corporation and industry custom. Habit and routine practice is a specific recurrence of a detailed conduct. On the bar exam, it is probably a habit if and when a conduct happens at least three or more times. Look for the words "instinctively"; and "Automatically" and, "invariably" as well as "always" for habit.

Expert Testimony.

Expert testimony differs from lay witness testimony, in that an expert witness needs special qualifications.

A witness is Qualified as an expert if he possesses special: (1) Knowledge; (2) Skill; (3) Experience; (4) Training; (5) Education.

An expert's opinion may be based on: (1) Personal observation; (2) Facts made known to the expert at trial; or, (3) facts not known personally but supplied to him outside the courtroom and of a type reasonably relied upon by experts in the particular field.

Under the federal rules, an expert may render an opinion as to the ultimate issue in the case.

The major exception here is that in a criminal case, when a defendant's mental state constitutes an element of the crime or defense, an expert may not state an opinion as to whether the accused did or did not have the mental state in issue.

Regarding the expert's reliability and relevancy: If the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness is qualified as an expert by knowledge, skill, experience, training, or education, he may then testify in the form of an opinion or otherwise if: (1) The

testimony is based upon sufficient facts or data; (2) The testimony is the product of reliable principles and methods; and, (3) the witness has applied the principles and methods reliably to the facts of the case.

Expert testimony is considered a proper subject matter if the: (1) Scientific; (*2) Technical; or, (3) other specialized knowledge would assist the trier of fact.

An opinion will assist the trier of fact if it is relevant and reliable.

Real, Demonstrative, and Experimental Evidence.

Real evidence consists of objects that were involved in a case or actually played a part in the incident or transaction in question such as a contract or a murder weapon.

Demonstrative evidence is evidence in the form of a representation of an object such as photographs and movies. Note that if the photographs are too bloody and thus the probative value is substantially outweighed by the unfair prejudice, then the photos will be excluded.

Experimental evidence is when a party needs to establish some fact and satisfactory proof does not exist, he may develop evidence by experimentation in court or by testimony of the experimentation done before trial. This method is often used to duplicate the event in question.

It is important that you learn to identify evidence in these forms and apply evidence rules in order to determine if they are admissible on the bar exam.

Privileges and other policy exclusions

Spousal Immunity and Marital Communication Privilege.

The notion of Spousal Immunity protects one spouse from being forced to testify against the other for any reason during a criminal case.

For spousal immunity to be applicable, the witness seeking immunity has to be: (1) In a valid marriage at the time of a trial (Although the immunity also protects premarital events); and, (2) The holder of the privilege is the witness spouse, not

the party spouse; and, (3) This immunity applies only in criminal cases.

Another, similar privilege is the Confidential Marital Communications Privilege.

This privilege provides that a husband and wife shall not be: (1) Required or, without the consent of the other shall not be allowed to disclose confidential communications made to the other during marriage; (2) Must have been married at the time that the communication was made; (3) Non-confidences are not protected (such as in a public place); (4) either spouse holds this privilege; and, (5) Applies both to Criminal and Civil cases.

Now comes the attorney-client privilege and work product doctrine.

The Attorney-Client privilege regards confidential communications between a client and his attorney made during professional legal consultation. Such conversations are privileged and cannot be disclosed unless confidentiality is waived by the client, or if deceased, then by a representative of the decedent-client

The exceptions to the attorney client privilege include: (1) Future crime or fraud; (2) When the client affirmatively puts the communication in issue; (3) Disputes between the parties to the professional relationship, actions for fee or malpractice; and, (4) Where two or more parties communicate with the attorney about a matter of common interest.

On the other hand, Work product protects materials prepared in anticipation of litigation from discovery by opposing counsel.

Work product may be prepared by someone other than the attorney, as long as it is for the possibility of impending litigation. Further, work product is less powerful than the attorney client privilege because it is not a privilege and can thereby be overcome by a showing of necessity by the opposing party.

Now comes the Physician or Psychotherapist Patient Privilege.

The patient has a privilege against disclosure of confidential information acquired by the physician or psychiatrist within a professional relationship which is entered into for the purposes of obtaining treatment.

The elements which must exist in this privilege include: (1) The patient must be seeking treatment; (2) Information acquired must be confidential and necessary to facilitate professional treatment.

Therefore non-medical information is not privileged.

Furthermore if the patient sues or defends by putting his physical or mental condition at issue, he waives this privilege.

Now comes the Constitutional Privilege Against Self-incrimination.

Self-incrimination is the Fifth Amendment right of a person to refuse to answer questions or otherwise give testimony against himself which will subject him to incrimination. Look to the Criminal Procedure part of the Criminal Law outline to see respective limitations to this privilege.

Miscellaneous Privileges.

Applicability of state privilege.

There are three state evidence laws which will apply in the federal court if the state substantive law applies, as is the case in typical diversity jurisdiction situations: (1) presumptions and burdens of proof; (2) competency of witnesses; (3) State privileges.

Federal privilege law in cases of: (1) Federal Criminal cases; and, (2) Federal questions; (3) Shall be governed by the principals of the common law as they may be interpreted by the courts of the United States in the light of: (4) Reason; and, (5) Experience.

Now comes Insurance Coverage.

Evidence which regards the insurance coverage is generally inadmissible to prove: (1) Negligence; or, (2) ability to pay; however, (3) It may be admissible to: (a) Prove ownership; (b) or to impeach the credibility of a witness.

For Example in a case involving a horrible farming accident. Farmer Furious ran over Commissioner Clutz's ankle causing it to require amputation. During the trial Sleazy, the claims adjuster for Furious's tractor insurance was called to the stand after

Furious disputed ownership of the tractor, Cluts's attorney asks " Aren't you the claim's adjuster for Furious's tractor?"

Such a question is allowed because it is being used to show ownership.

Furthermore; If the if the attorney felt that the claim's adjuster would be biased he could be asked "Aren't you the claims adjuster for Furious's insurance company that will be charged with paying this claim?" may be admissible for purposes of demonstrating the witness's bias and interest.

Now comes Remedial Measures.

In general, subsequent remedial measures are inadmissible to show: (1) Negligence; (2) Culpable conduct; or, (3) Strict liability. However, subsequent remedial measures are admissible if they are used to show ownership or control or to impeach a witness.

For example in a personal injury case involving the spontaneous combustion of a gas powered stove, if the manufacturer is called to the stand and testifies that "This is the best stove money can buy, it is completely safe with all the measures built into it." Then by recalling for repair, and making repairs to a defective part, this evidence may be used to show that it is feasible to take precautionary measures, thereby impeaching the credibility of the witness.

Compromise, payment of medical expenses, and plea negotiations.

Generally, compromise is not admissible to prove: (1) Negligence; (2) Culpable conduct; (3) Amount of damage; (4) Admissions of fact; (5) Admissions of liability; (6) admissions of damage made in : (a) course of offer to compromise; (b) a claim disputed or; (c) as to amount, are inadmissible.

This rule of exclusion covers: (1) Actual Compromise; (2) Offers to compromise; (3) Offers to plead guilty in a criminal case; (4) Withdrawn pleas of guilty and nolo contendere.

For the rule of exclusion to operate there must be: (1) A claim which must be disputed as to either: (a) Liability; or (b) Amount; (2) And an offer to pay medical expenses.

Note however, if an admission of fact accompanies a naked offer to pay medical expenses, the admission may be admitted.

Thus, for instance, Dora the Explorer is swimming across a border river, and Dundee is recklessly operating his air boat and strikes Dora. As she is prone, and bleeding, Dundee says "Oiy! It was all my bloomin' fault! Lemme' pay your 'ospital bills!"

The "It was my fault" statement is admissible because it was accompanied by an offer to pay medical expenses; but note that "Lemme' pay your 'ospital bills" will be inadmissible.

This is because payment of medical expenses are generally inadmissible to prove: (1) Culpable conduct; (2) Admissions of fact during an offer to pay however are admissible.

Moreover, withdrawn guilty pleas and offers to plea guilty or nolo contendere are almost always inadmissible.

Past Sexual Conduct of a Victim.

Regarding past sexual conduct of a victim in a criminal case alleging sexual misconduct, the community's opinion or reputation towards the victim can never be used by the defense as evidence proving consent.

Specific instances of sexual behavior of the alleged victim are only admissible: (1) If it is offered to prove that the third party was the source of: (a) semen; (b) injury; or (c) other physical evidence; (2) To show prior acts of consensual intercourse between the alleged victim and the accused; or (3) if the exclusion would amount to a violation of the constitutional rights of the accused.

Writings, recordings, and Photographs.

Requirements of the original rule, or Best Evidence Rule.

A foundation for secondary evidence has been established if the: (1) Explanation for absence of the originals is reasonable; (2) Then a copy of the original; or, (3) oral testimony about the original may be admitted to prove the contents of the original.

Summaries.

Summaries of a writing are admissible if the originals themselves would have been admissible if offered, and the originals are made accessible to the opposing party.

Completeness Rule:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction, at that time, of any other part or any other writing or recorded statement, which ought in fairness, to be considered contemporaneously with it.

On the Exam this is usually tested with the Parol Evidence Rule.

Remember that the Parol Evidence Rule prohibits oral testimony of any prior or contemporaneous agreements which alter the terms of a contract which is intended to be a complete integration of the parties. However, it does not prevent oral testimony regarding the contents of a written agreement.

Hearsay and Circumstances of its Admissibility.

This is the most important topic in Evidence. This is because Hearsay and the circumstances of its admissibility will cover one third of the evidence questions, and it is divided into twelve parts.

(1) Definition of Hearsay.

Hearsay is an out-of-court statement which is offered to prove the truth of the matter asserted within that statement.

Unless one of about 30 exceptions applies, then hearsay is inadmissible as evidence in the United States.

If the evidence is offered for a purpose other than that of truth, then the statement may be admissible.

For instance, out-of-court verbal acts or legally operative facts may be admissible when it is offered, not for the truth of the matter, but for the fact that it just occurred. It could be a verbal act that shows: (1) Offers; (2) Acceptances; (3) Defamation; or, (4) Conspiracy. All of these demonstrate that the event occurred and not the truth of the matter within the statement.

Furthermore, verbal acts can be offered to demonstrate its effect on the listener in order to demonstrate: (1) Notice; (2) Good faith; or (3) Reason of action or inaction.

Also, a statement to show circumstantial evidence of the witness's relevant state of mind such as an intent to kill may also be admitted.

Some prior statements of a witness are also not hearsay. They include (1) Prior inconsistent statements under oath at a trial, hearing, or other proceeding; (2) Prior consistent statements used to rebut a charge of recent fabrication, or improper influence; or motive; (3) And prior statements of identification made by the witness.

Another hearsay except are statements which are attributable to a party opponent. Admissions made: (1) By a party; and, (2) Offered against that party, are not hearsay.

The statement: (1) Need not be based on personal knowledge; and (2) Can be a legal conclusion such as "Gee I was negligent batman!".

An admission is a statement or act done that amounts to a prior acknowledgement by one of the parties of one of the relevant facts. It can be vicarious through a party's agent or co-conspirator.

If an admission is made by a party's employee, then: (1) it has to concern a specific matter; (2) Within the scope of employment.

Vicarious admission only includes statements made during the existence of the relationship.

Additionally, an admission can be express or it can be implied, including silence in response to another person's statement. Note, however, that for silence to constitute an adoptive admission of the other person's statement, the circumstances must establish that the party would naturally have responded to the statement if it were untrue.

Sometimes there are multiple hearsay's in one statement. In order for multiple hearsay statements to be admissible, there must be an exception to the hearsay rule which applies at each level of the hearsay.

For instance, a witness made an inconsistent statement under oath before the trial. This inconsistent statement as about the Defendant saying something out-of-court against the defendant's co-conspirator and in furtherance of the conspiracy.

This is admissible because: (1) First level inconsistent statement under oath, admissible; (2) Second level, admission made by a party against that party, also admissible.

Hearsay statements have about 30 or more exceptions. On the Bar Exam, hearsay statements will be objected to, and you must decide if the objections can be sustained or not. If they are not one of the exceptions, then the hearsay statement is inadmissible. Following this are some of the most tested exceptions.

(2) Present Sense Impression: Hearsay Exception.

It is a statement describing or explaining an event or condition, and the statement was made while the declarant was perceiving the event or immediately thereafter. The event does not need to be a startling event, but the statement must be contemporaneous with the event, which means that no time has passed between the statement and the event.

(3) Statements of Mental, Emotional, or Physical Condition: Hearsay Exception.

This exception applies to statements about the state of mind, emotion, or sensation, or physical condition existing at the time the statement was made.

The statement has to be used to establish intent or circumstantial evidence that the intent was carried out, and the statements of memory or belief are inadmissible to prove the fact remembered or believed.

Thus: (1) Statement of existing intent to do something in the future..Then existing statement offered to infer that the intended future event was carried out (Witness said I am going to Auto Rama on Monday; offered to prove that witness was at Auto Rama).

Excited Utterance is the next exception. Excited utterance statements are the statements relating to a startling event made while under the stress of that excitement.

The statements usually concern the facts of the startling event. Look for the type of event, time lapse, and words of excitement.

Next Declaration of then-existing physical condition. this is where a statement which can be a hearsay exception is a declaration of physical or mental condition that existed at the time the statement was made. The statement is admissible to show the condition. "Ouch! It hurts" would be an example.

(4) Statements for purposes of medical diagnosis and Treatment: Hearsay Exception.

This exception refers to a statement made to medical personnel for diagnosis or treatment. Such statements can be a declaration of the past or present condition.

Past Recollection Recorded: Hearsay Exception

Generally, a witness cannot read from a writing in aid of oral testimony. However, when the witness cannot remember something which he previously had knowledge of and wrote down, he can then read from the writing in aid of oral testimony. Of course, there are requirements which the writing must meet.

(1) The witness has to have personal knowledge of the writing;
(2) The statement in the writing must be made by the witness, under his supervision, or adopted by him at the time of the event; (3) The statement has to be accurate and necessary to recall the information.

Thus on the Bar, if a witness says I cannot remember before something was presented to him, then consider past recollection exception. The writing can be read to the jury but does not go to the jury. Compare this when you are impeaching a witness, or already have the witness answering a question and he forgets something. that is Refreshing Recollection and it cannot be read to the jury.

(6) Business Records: Hearsay Exception.

Business records are entries made in the regular course of business, and the reporting party had personal knowledge of the entry. The entry was made at or near the time of the event, and the record must be authentic. To ensure that the record was authentic, a custodian has to testify or the record is certified.

The reason that the business records is a hearsay exception is because employees are under a business duty to be accurate in observing and reporting facts, and the record can substitute for

the testimony of the reporting party. Therefore, hearsay exception applies if the entry is germane to the business. When you see the business records hearsay exception, watch out for issues of multiple hearsay, and apply it at each level to see if you can get it through.

(7) Public records and reports.

Public records include certified copies of business or public records, official publications, newspapers and periodicals, trade inscriptions or labels, acknowledged documents such as affidavits, and UCC signatures on commercial documents.

(8) Learned Treatises: Hearsay Exception.

Treatise is usually hearsay, but admissible under the learned treatise exception if it is established as reliable.

A treatise is reliable and authoritative if it is actually relied on by an expert. An attorney can elicit admission from the expert stating that the treatise is authoritative and reliable or the attorney can bring in an expert to testify that the treatise is reliable and authoritative.

Further, a party can seek judicial notice to recognize the authority of the treatise.

Regarding the function of a learned treatise, it can be used to impeach an opposing expert, or to support your own expert. In practice, the treatise is read to the jury but is not received as evidence, and thereby an expert must testify unless the judge takes judicial notice.

Former Testimony and Deposition: Hearsay Exception.

The court reporter makes a verbatim record of all that is said during a prior proceeding or a deposition, in the same manner that the witness testimony is recorded in the court at a present proceeding.

These records or former testimony and depositions are admissible when the witness is unavailable, and the party against whom the statement is offered had the opportunity to examine the witness in the prior proceeding. The prior proceeding involved the same issues, and the party against whom the statement is offered had the same motive to examine the witness in the prior proceeding as in the present proceeding.

Additionally, the party against whom the statement was offered must have been a party in the first proceeding. In a civil case, privity with the party in the first proceeding is enough. This requirement doesn't apply to grand juries because there is no opportunity to cross examine.

(1) Statement against interest: Hearsay exception.

Statements against interest refer to the statements against the witness's: (1) Pecuniary; (2) Proprietary; or (3) Penal Interests.

For the statements to be admissible, the witness has to be unavailable during the trial. Also, at the time the statement was made, the witness must have personal knowledge about the statement he was making and statements against interest can be made by anyone not just a party.

In criminal cases, the third party confessions that will benefit the defendant must be corroborated by circumstances indicating that the statement is trustworthy.

(11) Other Exceptions to the Hearsay Rule.

The last exception to hearsay rule this outline will cover is dying declaration.

Dying declaration is referring to the statements made by the witness when he believes death is imminent at the time the statement was made.

The witness has to be Unavailable at the time of trial although he does not necessarily have to be dead. This exception is common seen in a homicide case, or a civil action, and the statement is about the cause or circumstances of impending death.

(12) Right to Confront Witnesses.

The accused has the right to cross-examine the witness who presented evidence against him. This is called the right to confront witnesses.

Real Property.

Ownership.

For the MBE ownership makes up 25% of the real property questions.

Interests in land are also called estates.

Present Estates.

An owner has an interest in land presently and not only in the future.

The most complete form of ownership, is an absolute ownership with potentially infinite duration. This is known as Fee Simple Absolute.

Fee simple Absolute is created by the language: "To Transferee"

Fee Simple Absolute is: (1) Freely devisable, which means the right can be transferred in a will; (2) Freely Descendible, which means it can be passed down to heirs; and (3) Alienable, which means that the right can be transferred inter-vivos.

In fee simple absolute, if a living person has no heirs, then there is no accompanying future interest because all the interests are given to the grantee upfront.

An abolished interest was the fee tail. This was created by the language "To transferee and the heirs of his body". Now, it just creates a Fee Simple Absolute.

Another type of estate is the Defeasible Fee Simple. This estate exists when a property is given to a person with some conditions.

The first type is the Fee Simple Determinable, which is created with the language: (1) To Transferee for so long as "A specified condition"; (2) To transferee during "A specified time"; or (3) To transferee until...

Notice that the fee simple determinable uses clear DURATIONAL language.

Thus the grantor must use clear durational language, and if the stated condition is violated, then forfeiture is automatic.

fee Simple Determinable is: (1) freely devisable; (2) descendible, and (3) Alienable; (4) But is always subject to the durational condition.

Furthermore a fee simple determinable comes with a future interest, the possibility of reverter, which is the grantor's future interest in land. if the condition was met, then the interest in land automatically goes back to the grantor.

The next defeasible fee simple is the Fee Simple Subject to A Condition Subsequent. It is created by the language "To transferee, but if X event occurs, the grantor reserves the right to reenter".

Basically, the grantor must use conditional language and must carve out his right to re-enter. Unlike fee simple determinable, fee simple subject to condition is not automatically terminated, but it can be cut short at the grantor's option if the stated condition occurs.

The future interest that comes with it is the Right of Entry or power of Termination. the grantor has the power to terminate the gratee's right, but the termination is not automatic.

The next defeasible fee simple is the fee Simple Subject to An Executory interest. This is created by the language "To grantor, but if X event Occurs, then to Beta".

As is evident, someone other than the grantor takes the future interest. If the stated condition is broken, then the forfeiture is automatic, which is in favor of someone other than the grantor. This someone has the shifting executory interest.

Remember that these interests can only be created with very specific language. Words of mere purpose, desire, or hope, or intention are not sufficient to create a defeasible fee.

furthermore, words that put absolute restraints or bans on alienation are void because the courts desire to keep these estates alienable when possible in order to free up the market.

The next defeasible fee is the life estate. It can be created with the language "To grantee for life". This Estate is measured by the life of the grantee (or in some-cases others) and is never measured in terms of year.

If the life estate is measured by the life of one other than the grantee; Such as "To Herpa for the life of Derp" then the estate is called a life estate Pur Autre vie.

Note that in both forms of life estates, the future interest is reversion.

After the life of the designated measuring life is passed, the property reverts back to the grantor automatically. consequently, the grantee or the tenant is entitled to all the ordinary uses and profits of the land, but cannot commit waste thereupon.

There are 3 majors ways to commit waste upon a property: (1) Voluntary or Affirmative waste- Voluntary waste is in reference to overt conduct that causes a decrease in value. that means that the life tenant must not consume or exploit natural resources on the property such as : (a) timber; (b) Oil; or (c) other minerals. However, if prior to the grant the land was used for exploitation, then it is okay for grantee to do so as well.

(2) Permissive waste- Grantee or tenant must maintain the premises in reasonably good repair, and must pay ordinary taxes on the land. If the grantee fails to do so, then it is permissive waste.

(3) Ameliorative Waste- Counter-intuitive doctrine. When the life tenant acts to enhance the property's value, it is considered Ameliorative waste.

Life estates are not descendible or devisable because the interest in land reverts back to the grantor after the life estate is over. The life estate however, is alienable meaning that it would create a Life estate pur autre vie.

Property can be owned by more than one person at a given time. the parties who own property jointly are referred to as co tenants or joint tenants depending on the type of tenancy in question.

Co-tenancy

There are three kinds of Co-tenancy estates: (1) Tenancy in Common; (2) Joint Tenancy with right of survivorship; and (3) Tenancy by the Entirety.

With respect to Tenancy in common...In a tenancy in common, each co-tenant owns an individual part, with right to possess the whole.

there is no right of survivorship, which means that if one owner dies, that owner's interest in the property will pass by inheritance to that owner's devisees or heirs either by will or by intestate succession.

Each interest is: (1) Descendible; (2) Devisable; and (3) Alienable.

When an estate is unclear about what type of co-tenancy is involved it is Tenancy in Common for purposes of the bar exam.

In regards to the rights and duties of co-tenants in tenancy in common, all tenants must have the right to possess the whole property. No one tenant has the right to evict the others and thus have exclusive ownership (this is known as ouster).

For instance, Jack and Mary bought the farm together. Jack paid 80% While Mary payed 20%. Both of them will have right to possess 100% of the property. Jack cannot tell Mary to stay in her 20% part of the farm.

Also, co-tenant possession is not liable to others for rent, and a third party rent should be shared among the co-tenants based on the co-tenants' percentage of ownership.

Co-tenant's cannot acquire title via adverse possession, unless there is an ouster, which means a co-tenant is refused access to his concurrent estate.

Each co-tenant is responsible for their share of carrying costs such as taxes or mortgage by percentage of ownership.

Each co-tenant also enjoys the right to contribution for reasonable and necessary repairs, provided that he has notified the others for the need of repair.

co-tenants do not have rights to contribution for improvements, but they are entitled to credit equal to any increase or decrease in value caused by efforts.

for instance, Derp threw a baseball and broke Jack and Mary's Farm house's window. Mary got Jack's approval to, and did, fix the window.

Mary is entitled to contribution for the repair from Jack. After fixing the window, if Mary decided to apply Rhinestones to the window for a more decorative look; then she is not entitled to the contribution for the improvement. However she is entitled to the increase or decrease in value by partition.

Co-tenants must not commit: (1) Voluntary waste; (2) Permissive waste; or, (3) Ameliorative waste.

A joint tenancy or tenancy in common can bring an action for partition, but a Tenancy in Entirety cannot.

Joint Tenancy is the Dual ownership with right of survivorship, which means when one of the owners dies, his share passes automatically to the surviving joint tenants.

Accordingly, this interest is alienable, but not devisable or descendible.

To create a Joint Tenancy, Joint tenants must take their interests with the following four unities:

At the same time

By the same Title

In the same instrument

With the Identical Equal Interests and rights to possess the whole

The language must state the right of survivorship as joint tenants are disfavored because people use them to avoid probate. And the grantor must clearly state the right of survivorship.

People can use a Straw such as a Middleman to help them create a joint tenancy to satisfy the four unities.

Now let's discuss the severance of a Joint Tenancy.

A joint tenant can sell or transfer his interest during his lifetime, with or without the other joint tenant's consent or knowledge.

When the sale happens, it severs the four unities, and therefore there is a Tenancy in Common between the new buyer and the Joint Tenants. However, Joint Tenancy remains intact between the non-transferring Joint Tenants

Also, a joint tenant severing his share will sever it at time of entering into a contract, not at closing.

If a seller Joint Tenant dies while the property is in escrow, then the rest of the joint tenants cannot get the right of survivorship.

In Joint Tenancy, partition can be decided in several ways:

Through a voluntary agreement

Partition in kind in which the judge decides how to split the land up

Or through a forced sale, in which the land will be sold and proceeds will be divided

I will go into the detail of mortgage in another section, but the general rule is that in the Title Theory of Mortgages, one Joint Tenant's execution of a Mortgage or a Lien on his share will sever the Joint Tenancy of the now encumbered share.

By contrast, the majority of states follow the lien theory of mortgages, whereby a joint tenant's execution of a mortgage on his interest will not sever the joint tenancy.

Tenancy by the entirety is a protected marital interest between husband and wife with the right of survivorship. It arises presumptively in any conveyance to husband and wife, unless otherwise stated.

Tenancy by entirety is a very protected form of ownership.

Example: Creditors of only one spouse cannot touch this tenancy by the entirety because there is no unilateral conveyance.

Future Interests

Definition: Interests in land that the owner may not enjoy now but may enjoy in the future.

The first future interest is "Reversions."

An agreement such that one party, usually the grantee, is given a possessory interest in a property from another, usually the grantor, under the understanding that the interest will "revert" to the grantor at the expiration of the grantee's interest such as grantee's death or expiration of a term of years, etc.

For Example, "to A for 10 years." The grantor has the reversion.

The second future interest is "Remainders."

Remainders can be vested or contingent in a 3rd Party.

It is a future interest created in the grantee capable of becoming the possessor upon the expiration of prior possessory estate created in the same conveyance in which the remainder was created.

For Example: "To A for life, then to B," B has the Remainders.

Remainderman always follows a preceding estate of known fixed duration like Life estate or Term of Years)

Remember, Remainderman waits for the Preceding Estate to run its natural course and never follows a defeasible fee simple.

Also, Remainders are either vested or contingent.

Contingent is when the remainderman is unascertainable or subject to a condition precedent.

If remainderman meets the condition precedent, then the remainderman becomes an indefeasibly vested remainder. It is worth noting that the grantor will always have the reversion.

Let's look at the "Vested Remainder" in detail.

To create an indefeasibly vested remainder, the language will be something like "to A for life, remainder to B"

If A is alive, then B has an indefeasibly vested remainder. At common law, if B predeceases A, B's heirs have the vested remainder.

In this case, the holder of the remainder is certain to acquire an estate in the future, with no strings attached.

The next type is "Vested Remainder Subject to Complete Defeasance"

It is created in a language like "to A for life, remainder to B, provided, however, that if B dies under the age of 25, then to C."

As you can see "the condition that follows the remainder" makes Vested Remainder subject to complete defeasance also vested remainder subject to a condition subsequent.

In this case, B has the vested remainder subject to total divestment.

B still takes the property if he is under 25 as long as he is alive, but if B died before 25, C will get it. C, therefore, has a shifting executory interest

Here, the remainder is not subject to a condition precedent. However, it is subject to a condition subsequent.

The difference between a condition precedent, which creates a contingent remainder, and a condition subsequent, which creates a vested remainder subject to complete defeasance, is where the conditional language is.

If the conditional language is before the passing to B, then it is a condition precedent and therefore a contingent remainder and grantor has a reversion.

If conditional language is after the passing to B, it is a vested remainder subject to complete defeasance.

Sometimes the Vested Remainder is subject to open. That happens when the language is like "to A for life, then to B's children" Children, in this case is the vested remainder subject to open. A class is open if it is possible for others to enter and B has children at the time of the grant but may have more children.

Remainder is vested in a group of takers, at least one of whom is qualified to take possession.

Each class member's share is subject to partial diminution because additional takers not yet ascertained can still qualify as class members.

"Rule of Convenience" provides that a class closes whenever any member can demand possession. Here, the class closes when either A dies or B dies.

Womb Rule states that a child in the womb at A's death who would be a member of the class if alive will share in the class. A child in the womb is considered alive.

Some remainders are contingent remainder, they can be created in language like "to A for life, then to B's first child" or "to A for life, then, if B graduates, to B." This is a remainder

either created in an unascertained person OR is subject to a condition precedent, or BOTH.

Like a vested remainder, contingent remainder always accompanies a preceding estate of known fixed duration, like a life estate or a term of years.

Let me quickly go over some doctrines that have been abolished and how the new rules apply.

The first is "Rule of Destructibility."

At common law, a contingent remainder was destroyed if it was still contingent at the time the preceding estate ends. Now it will create a fee simple subject to a springing executory interest.

Second abolished rule is "Shelley's Case."

Before, Shelley's case would apply if the language says: "to A for life, then on A's death, to A's heirs".

It will create a merger of the two interests and give A a fee simple absolute.

Now, if Derp has no heirs and Derp is alive, it will create a life estate and a reversion in the grantor. Heirs will then have a contingent remainder.

Next is the "Doctrine of Worthier Title". It applies when the language says the grantor conveys "to Derp for life, then to the grantor's heirs" Clearly, the grantor tries to create a future interest in his heirs

As Rule of construction, the grantor's intent controls.

If the grantor clearly intends to create a contingent remainder in his heirs, then that intent is binding.

The grantor would have a reversion when Derp dies

Now let's look at the executory interests.

The language that creates executory interests is:

"To Herp, if and when he marries" (springing)

"To Herp, but if Herp does not use the land for farming, to Burp" (shifting)

Executory interest is a future interest created in a transferee, which is not a remainder and takes effect by either cutting short some interest in another person or in the grantor or his heirs.

The shifting interest always follows a defeasible fee and cuts short someone other than the grantor's interest.

The springing interest, on the other hand, cuts short the grantor's interest such as "to A if and when he passes the bar exam, or to B"

A has a fee simple subject to B's shifting executory interest.

The last 2 future interests are Possibilities of Reverter and Powers of Termination

As mentioned previously, Possibilities of reverter is the future interest created with fee simple determinable

The grantor automatically gets the real property back if the grantee violates the condition

Powers of termination or right of entry, on the other hand, is the future interest created with fee simple subject to condition subsequent

A grantor has the power of termination when an estate will return to the grantor if a condition is violated and the grantor decides to reclaim the estate.

In addition, the grantor has to reclaim the estate.

4) The Law of Landlord and Tenant

The landlord and tenant relationship usually exist in a leasehold or nonfeehold estates.

Non-freehold estates can be broken down into:

Tenancy for years

Periodic tenancy

Tenancy at will

And tenancy at severance

Tenancy for years is created with the language: "to A from Jan. 1, 2013 to July 1, 2013" or "to A for 1 year"

It's a lease for a fixed determined period of time.

The statute of frauds applies to land contracts with terms greater than one year. Therefore, land contracts with terms greater than one year have to be in writing.

And to have a valid termination, a notice is not required as it simply terminates at the agreed upon date.

A periodic tenancy is created with the language: "to A from month to month," and is a lease that continues for successive or continuous intervals, until the landlord or the tenant gives proper notice of termination.

The express statement of "month to month" or "year to year" can be implied in 3 ways:

Land is leased with no mention of duration, but provision is made for payment of rent at set intervals

An oral term of years is a violation of the statute of frauds and creates an implied periodic tenancy

And in a residential lease, if landlord elects to hold a tenant who has wrongfully stayed on past the conclusion of the original lease, an implied periodic tenancy arises measured by the way the rent is now tendered.

Regarding termination, a written notice is required to terminate a periodic tenancy. The notice has to be at least equal to the length of the period itself unless otherwise agreed. That is, a termination for a month-to-month has to be given at least 1 month before the desired termination.

Example: If you had a week-to-week, then a written notice of termination must be given a week before the desired termination.

The exception is when the period is lengthy. For instance, in the case of year-to-year, only a 6-month notice is required.

By private agreement, parties may lengthen or shorten the notice requirement. The period tenancy, however, must end at the conclusion of the natural lease period.

For Example, if A leased a property to B on January 1 for month-to-month, a notice given on June 15 will make a bound until July 30.

Another lease is tenancy at will which is created with the language such as "to tenant for so long as landlord or tenant desires". Tenancy at will has no fixed period of duration.

Unless the parties expressly agree to a tenancy at will, payments of regular rent will cause the court to treat the tenancy as an implied periodic tenancy.

The termination notice can be given at any time, but a general reasonable demand to vacate is required.

The last type of lease is tenancy at severance which is created when the tenant has wrongfully held over past the expiration of the lease.

The lease lasts either until the landlord evicts the tenant or until the landlord elects to hold the tenant to a new term.

Now that we have covered the basic types of nonfreehold estate, let's go over the tenant's duties under these estate.

Regarding the tenant's liability to 3rd parties: the tenant is responsible for keeping the premises in a reasonably good repair. The tenant is also liable for injuries sustained by 3rd parties he invites, even where the landlord has expressly promised to make repairs. The tenant always loses although he may seek indemnification.

About the tenant's duty to repair: when the lease is silent, the tenant cannot commit waste and has the duty to maintain the property in the same shape it was in. The majority rule is that the tenant may terminate the lease if the premises are destroyed without his fault.

The most important duty is probably the tenant's duty to pay rent. If the tenant breaches his duty to pay rent and is in possession of the premise, then the landlord has several options.

The landlord can evict the tenant through courts or continue the landlord-tenant relationship and sue for rent.

The landlord cannot, however, engage in self-help such as:
Changing locks
Forcibly removing tenant
Or removing any of tenants possessions
If the tenant breaches his duty to pay rent but is not in possession of the premise, then the landlord can surrender, ignore, or re-let the property.

Surrender means that the landlord could treat abandonment as an implicit offer to surrender, which he accepts. If the unexpired term is more than 1 year, the surrender must be in writing to satisfy the statute of fraud.

Ignore means to ignore the abandonment and hold the tenant liable for any unexpired rent. And re-let is the method adopted

by the majority. The landlord must try to re-let to self-mitigate, and the tenant is liable for any deficiencies.

Landlord's duties: Foremost, the landlord has the duty to deliver possession, meaning that the landlord must put tenant in an actual & physical possession.

Some minority states hold that the landlord must only provide legal possession.

For Example, if at the start of the lease, there is another tenant who is a holdover, the landlord is in breach, and the tenant gets damages.

When the property is delivered, there are implied covenants.

First is the "Implied Covenant of Quiet Enjoyment", which is the right to quiet use and enjoyment of premises, without the landlord's interference. This covenant applies both to residential & commercial leases

Example: The landlord can breach by actual wrongful eviction, if the landlord wrongfully evicts or excludes the tenant from the premises.

The landlord can also breach by the constructive eviction.

Constructive eviction happens when the substantial interference is attributable to the landlord's actions or failure to act, and the tenant must give landlord a notice of some existing problem, and the landlord fails to act.

Also, the tenant must vacate within a reasonable time after the landlord fails to fix the problem.

The landlord is not liable for acts of other tenants, but the landlord has duty not to allow nuisances of others on the premises and the duty to control common areas.

Next is the "Implied Covenant of Habitability". This covenant only applies to residential leases and is non-waivable as waiving it would be against public policy

Basically, the covenant means that the premises must be fit for basic human habitation, and the bare living requirements must be met.

An Example of breaching the covenant of habitability would be a failure to provide heat during winter, plumbing, or running hot water.

The tenant can:

Move out

Repair & deduct

Ask for reduced rent

Or pay rent and affirmatively seek for money damages when the covenant of habitability is breached

If the tenant lawfully reports landlord for housing code violations, the landlord is barred from penalizing the tenant either through raising rent, ending lease, harassing tenant, or others.

The next topic under landlord and tenant is "Assignment v. Sublease".

Unless prohibited in a lease, the tenant may freely transfer his interest in whole or in part.

When the interest is transferred to another in whole, it is called assignment, when in part, sublease.

The landlord can prohibit tenant from assigning or subleasing in lease without the tenant's prior written approval.

However, once the tenant consents to one transfer, the landlord waives the right to object to any future transfers, unless the landlord expressly reserves the right.

When the assigned tenant and landlord are in privity of estate, the landlord is liable for all covenants of the original lease that runs with the land.

Assigned tenant and landlord are not in privity of contract, unless assigned tenant expressly assumed all promises in the original lease.

In other words, landlord and original tenant are no longer in privity of estate, but they remain in privity of contract.

That means the landlord and the original tenant are secondarily liable to one another.

In addition, in sublease situations, the assigned tenant is responsible to original tenant and vice versa.

The assigned tenant and landlord are not in privity of estate or privity of contract.

Regarding the landlord's tort liability, the general rule is that in tort, the landlord is under no duty to make the premises safe.

Exceptions include:

Defects in common areas

The latent defects rule where the landlord must warn of hidden defects of which he has knowledge of or reason to know

The assumption of repairs where the landlord has no duty to repair, but if he does repair, is liable for negligent repairs

The public use rule where a landlord who leases a public space such as a convention hall and who should know, because of the nature of the lease, that the tenant will not repair, is liable for any defects on the premises.

And the short term lease of furnished dwelling where the landlord is responsible for any defect that harms the tenant that the tenant does not have time to fix it himself

5) Special Problems

The first one is "Rule Against Perpetuities", or commonly referred to as RAP.

RAP states that a future interest is void if there is any possibility, however remote, that the given interest will vest more than 21 years after the death of a measuring life.

As a reminder, a vested remainder is created in:

An ascertained person

Not subject to any condition precedent, where a contingent remainder is created in an unascertained person

Or subject to a condition precedent or both.

RAP applies to contingent remainders, vested remainders subject to open, and executory interests. It will not apply to indefeasibly vested remainders, or vested remainders subject to complete defeasance.

Remember, a gift to an open class that is conditioned on the members surviving to an age beyond 21 violates the common law RAP.

For Example: "to A and his heirs so long as the land is used for schooling purpose, and if the land ceases to be so used, to B and his heirs."

4-step analysis:

Step 1: Always determine which future interests are created
Must be one of the three future interest mentioned above to
apply RAP.

In this Example, B has executory interest.

Step 2: Identify the conditions precedent to the vesting of the
suspect future interest: the condition here is use the land for
schooling purpose

Step 3: Find a measuring life: A is the measuring life, he can
decide to abide by the condition or not

Step 4: Ask, will we know, with certainty, within 21 years of
the death of our measuring life, if our future interest
holder(s) can or cannot take the property?

The answer is no. After A dies, we do not know if A's heirs will
keep using the land for schooling purpose.

Therefore, this Example has violated the RAP.

There are exceptions to every rules, including RAP:

A gift from one charity to another does not violate RAP.

The modern RAP has a "wait & see" doctrine. Under this majority
reform effort, we wait for the measuring life to run its natural
course and then take a second look to see if the RAP applies.

Also, the uniform statutory RAP codifies the common law RAP and
makes it 90 years instead of 21years.

On the Bar Exam, look for the instruction.

Alienability is the right to transfer a property from one party
to another:

Fee simple absolute is alienable

Defeasible fee simple is alienable

Life estate is alienable

Tenancy in common is alienable

Joint tenancy is alienable

Descendability is the right to pass a property to heirs:

Fee simple absolute is descendible

Defeasible fee simple is descendible

Life estate is not descendible

Tenancy in common is descendible

Joint tenancy is not descendible

Devisability is the right to pass a property through wills:

Fee simple absolute is devisable

Defeasible fee simple is devisable

Life estate is not devisable

Tenancy in common is devisable

Joint tenancy is not devisable

Rights in Land.

Covenants at Law and in Equity

It can be created in two forms:

The first is Affirmative Covenants, a promise to do something related to land

The second is Restrictive Covenants, or Negative Covenants, which is a promise to Refrain from doing something to land

To know whether to construe the given promise as a covenant or as an equitable servitude, we should look to the remedy that the plaintiff seeks.

If Plaintiff seeks money damages, then we can construe it as a covenant.

If Plaintiff seeks an injunction, then we can construe it as an equitable servitude.

The covenant runs with the land when it is capable of binding successors.

When it does, there are burden and benefit.

For Example, when A promises B that A will not kill chickens on A's property, A's property is burdened by the promise that will benefit B's property.

For the burden of covenant to run, the following elements need to be present:

Writing, the original promise in writing

Intent, the original parties intended that the covenant would run

Touch and concern the land: the promise must affect the parties' legal relations as land owners, and not simply as members of the community at large. This means the covenant must relate to the direct use or enjoyment of the land.

Notice: the subsequent owners must have had actual notice, inquiry notice, or constructive notice of the covenant at the time of purchase

And Horizontal Privity and Vertical Privity

There is "Horizontal Privity" between A and B if the promise between them was made in connection with a conveyance of the land.

Examples: Grantor-grantee, landlord-tenant, or mortgagor-mortgagee relationship.

Horizontal Privity is very hard to prove because A and B need to have this relationship like A sells property to B.

There is "Vertical Privity" when the successor succeeded to the other's entire interest. Vertical Privity is easy to have.

A common scenario when it may be absent is when the property interest is acquired through adverse possession. On the other hand, for the benefit of covenant to run you only need:

Writing

Intent

Touch & Concern Land

AND Vertical Privity

Horizontal Privity is not required for the benefit of covenant to run.

On to Equitable servitudes, a Promise that equity will enforce against the successors.

No Privity is required to enforce equitable servitude. It is accompanied by injunctive relief.

For the burden and benefit of an equitable servitude to run, we need:

Writing

Intent

Touch & Concern land

And Notice, when the successors of burdened land had notice of the promise

Horizontal and Vertical Privity, however, are not required.

The burden and benefit of the equitable servitude apply to whoever is occupying the land.

Without writing, there may be an implied equitable servitude that is also known as the general scheme doctrine

Implied equitable servitude or general scheme doctrine applies when one grantor divides land up for residential development and the defendant lot holder has notice of the general scheme of the residential development

For Example:

A Builder buys land to create a subdivision for single-family homes.

The Builder sells 30 lots, and each deed, except for one, expressly provides that the lots are for single-family homes.

Buyer's deed did not contain the provision, and Buyer begins to build a four-unit apartment complex.

The other owners seek an injunction.

The court will imply an equitable servitude here because there was a common scheme or plan

Regarding notice, the defendant lot holder has to have notice of promises contained in prior deeds in the subdivision

The notice can be either an:

Actual notice, which is the literal knowledge of the general scheme

Inquiry notice, which is when the neighborhood conforms to a common restriction and thus the defendant should have known

Or a record notice, which is a notice on the basis of publicly recorded documents

Some courts say that the defendant is presumed to always have Record Notice if the general scheme is in any of the other deeds

A modern view is that the defendant does not have Record Notice and does not have to look up all the other deeds.

This view is more reasonable and puts less burden on the defendant and title searcher

Changed Condition is an equitable defense. The change has to be pervasive.

For Example, if everyone around him started building different units and the conformity is no longer there, then the defendant buyer may be able to continue with his four-unit.

2) Easements, Profits, & Licenses

An easement is a grant of a non-possessory property interest that entitles holder some form of use or enjoyment of another's land, called the servient tenement. It can be affirmative or negative.

Affirmative easement is the right to use that servient tenement and negative easement is the right to prevent servient landowner from doing something.

That something usually involves the use of:

Light

Air

Support of stream-water from artificial flow

And even scenic views in some states

Negative easements must be created expressly in a writing signed by grantor.

A careful distinction should be made between easement appurtenant and easement in gross. Easement appurtenant benefits its holder in his physical use or enjoyment of his property. It is transferred automatically with dominant tenement

On the other hand, with "easement in gross", holder gets a personal or pecuniary advantage that is not related to his use or enjoyment of his land.

Only a servient tenement will get the benefit and only an easement in gross for commercial purposes is assignable or transferrable.

An Example of easement in gross is the right to swim or fish in another's pond or the right to put in utility poles & power lines on another's land.

There are several ways to create an easement:

By prescription

Implication

Necessity

Or by grant

Easement created by Prescription means that an easement may be acquired by satisfying the elements of adverse possession.

Adverse possession is a continuous, actual, open and notorious, exclusive, and hostile possession.

Regarding the "easement created by implication or existing use": court will imply an easement if the previous use was apparent and the parties expected that the use would survive division because it is reasonably necessary to the dominant lands use and enjoyment.

Furthermore, easement by necessity happens in a landlocked setting. If the grantor conveys a portion of land with no way out, then, by necessity, the easement is created.

Finally, an easement can be created by grant. Due to statute of frauds, an easement to endure for more than one year must be in writing. The writing is called a deed of easement.

Scope of an easement: Determined by the terms of the grant or the conditions that determined it.

First of all, a unilateral expansion is not allowed.

Example scenario:

A grants B an easement to use A's private road to get to B's parcel or Land 1
B has an easement appurtenant to B's dominant land
A's parcel is servient
Subsequently, B purchases the adjacent Land 2
B cannot unilaterally expand the use of the easement to benefit Land 2

Termination of Easement: An easement can be terminated by Estoppel, which means the servient owner materially changes his position in reasonable reliance on the easement holder's assurances that the easement will no longer be enforced.

An easement can also be terminated by the end of necessity because Easement created by necessity expires as soon as the necessity expires .

The destruction of servient land, other than through willful conduct by servient owner, terminates the easement as well.

Other ways of terminating an easement include:

Condemnation of the servient land through government's eminent domain

A written release given by the easement holder

Abandonment by the easement holder

Merger of the Servient and Dominant Land

And prescription

Prescription happens when the Servient owner interferes with easement under adverse possession.

Profit entitles its holder to enter the Servient land and take from it the soil or some substance of the soil, such as minerals, timber or oil. In addition, profits follow the rules of easements.

On the Bar Exam, if the landholder does not have easement, then he probably has a license.

License is the mere privilege to enter another's land for some delineated purpose. It does not need a writing and is freely revocable unless there is a Detrimental Reliance.

Classic License Case on the Bar Exam:

Ticket Holders: Ticket to movies, theatres, and other events create freely revocable licenses.

"Neighbors Talking by the Fence" is a classic oral easement that violates statute of frauds and thus is not an easement but a freely revocable license.

Estoppel: The license is irrevocable when there is a detrimental reliance.

For Example:

Neighbor A needs to build a swimming pool in his backyard.

In order to do so, he needs to use neighbor B's yard to transport all the big equipment

Neighbor B consents orally. No writing, no easement.

Neighbor A paid for materials and labors, and then neighbor B regrets

Neighbor A's detrimental reliance made the license irrevocable

3) Other Interests in Land

Other interests in land I will cover include fixtures and scope and extent of real property.

Fixtures is a once movable chattel that, by virtue of its annexation to realty, objectively shows the intent to permanently improve the realty

When a tenant removes a fixture, he commits voluntary waste. Therefore, Tenant MUST not remove the fixture, even if he installed it.

Examples of fixture:

Heating systems

Furnaces

Custom made storm windows

And lighting

In UCC 9, security interest may be created in goods or fixtures.

Sometimes it is hard to tell whether an installation qualifies as a fixture or not. In that case, "Express Agreement" controls.

In absence of an agreement, the tenant can remove a chattel if the tenant can do so without causing substantial harm to the premises. If removal will cause substantial harm, then in objective judgment if the tenant has shown the intent to install a fixture, then the fixture must stay put.

Regarding the "scope and extent of real property", the landowner has rights over the superjacent space and the subjacent space.

Superjacent space is the air space above his parcel, and the subjacent space is the ground space below the landowner's parcel.

If a land is improved by buildings and an adjacent landowner's excavation causes that improved land to cave in, the excavator will be liable only if he acts negligently.

On the other hand, if the plaintiff can show that even if there were no buildings, the land would have collapsed because of adjacent landowner's actions, the excavating landowner is strictly liable.

The possessor of land also has the right to be free from trespass & nuisance. First, trespass is an invasion of land by tangible physical object.

On the rights in the common resources of light, air, streams, and bodies of water, water belongs to those who own the land bordering the water course. These owners are known as Riparians and share the right of reasonable use of the water. Also, one riparian will be liable if his use unreasonably interferes with other's use.

The Prior Appropriation Doctrine states that the water belongs initially to the state, but the right to divert it and use it can be acquired by an individual, regardless of whether or not he happens to be a riparian owner. It's important to know that rights are determined by priority of beneficial use: "first in time, first in right".

Surface water refers to rain, springs, or melting snow that hasn't yet reached its natural basin and surface owners are entitled to make reasonable use of ground water, but the use must NOT be wasteful.

Moreover, the Common Enemy Rule states that a landowner can change drainage to combat surface water. Many courts have modified the Common Enemy Rule to prohibit unnecessary harm to other's land.

Next, nuisance is a Substantial & unreasonable interference with another's use and enjoyment of land. There is no nuisance if the problem is the result of Plaintiff's hypersensitivity or specialized use.

Eminent Domain is the power given to state by the 5th Amendment to take a private property for public use with just compensation. This is a common constitution question.

Taking is either a physical invasion or a regulation that eliminates all viable economic use. And remedy is the compensation to the owner for the taking or the termination of the regulation & the payment to the owner for damages that occurred while the regulation was in effect.

4) Taking & Aspects of Zoning

The government may enact statutes to reasonably control land use.

Variance principal states that to achieve flexibility in zoning, a party must show undue hardship. And to deviate from zoning, the party must show undue hardship and that the variance will not be detrimental to surrounding property values.

Regarding a non-conforming use, a once lawful existing use now deemed nonconforming by a new zoning ordinance cannot be eliminated all at once unless just compensation is paid, otherwise, it could be deemed an unconstitutional taking.

The last common zoning issue is Unconstitutional Exactions: Exaction is the amenities the government seeks in exchange for granting permission to build.

Regulations regarding exactions are inherently suspect because it is tantamount to government extortion. To pass constitutional scrutiny, these exactions must be reasonably related in both nature and scope to the impact of the proposed development.

Real Property Contracts.

1) Relationships

In contracts to buy and sell by conveyance of realty, the land contract must be:

In writing

Signed by the party to be bound

And it must describe the land and state some consideration

When the amount of land recited in the land contract is more than the actual size of the parcel, the remedy is specific performance with a pro rata reduction in purchase price.

Land Contracts are often in a form of Installment Contracts. Installment Contracts are agreements under which the seller agrees to sell an interest in property to the purchaser.

The purchaser agrees to pay the purchase price in 5 or more subsequent payments exclusive of any down payment, and the seller retains title to the property as security for the purchaser's obligation under the agreement.

2) Creation & Construction
Statute of Frauds applies.

Land Contract requires writing signed by the party to be bound & it must describe land and state some consideration. Statute of Fraud can also be satisfied by part performance.

Part performance is satisfied if 2 of the 3 following are done:

Possession

Purchase

Or improvements

There are 8 Essential terms in a Land contract:

Identify the parties: The full name of the parties must be on the contract

Identify the real estate or property: At least the address, but preferably the legal description, must be on the contract

Identify the purchase price: The sales price or an appraisal to be completed at a future date must be on the contract

Include signatures

Have a legal purpose: The contract is void if it calls for illegal action

Parties must be competent: Mentally impaired persons and minors cannot enter into a contract

Reflect a meeting of the minds: Each party must be clear and agree to the essential details, rights, and obligations of the contract.

Include consideration: Consideration is something of value bargained for in exchange of the real estate. Money is the most common form of consideration, but other consideration of value, such as other property in exchange, or a promise to perform is also satisfactory

Regarding the implied conditions or terms of land contracts, if no time for performance is specified in contract, then reasonable time is allowed.

A title is required. The title required is a marketable or merchantable title at closing.

Sellers of residential real property, by default, have a duty to disclose any facts materially affecting the value or desirability of the property that are known or should be known with diligent observation. However, the seller is not liable for latent defects in property which he did not know about and had no reason to believe existed.

3) Performance

Regarding the fitness and suitability of the premises, there is no implied warranty of habitability or fitness in the land contract except when it involves the sale of a new home by a builder-vendor.

As mentioned above, in every land contract, the seller promises to provide marketable title at closing. Real property is unmarketable if the vendor owns less than a transferable contract or a property is burdened.

3 circumstances will render title unmarketable:

Adverse possession: If even the smallest portion is burdened with adverse possession then the land is unmarketable

Encumbrances: Marketable title means an "unencumbered fee simple" and therefore servitudes and mortgages render title unmarketable, unless the buyer waives them AND

Zoning violations: The title is unmarketable if the property violates a zoning ordinance.

A marketable title is a title free from:

Reasonable doubt

Lawsuits

And any threat of litigation

The property does not have to be perfect but there must be no apprehension of its validity in the minds of a reasonable, prudent and intelligent person. It is usually sufficient if the title has records to back it up. In short, the seller must supply a marketable title at closing and the buyer bears the risk of loss as soon as the contract is signed unless the contract says otherwise.

4) Interests before Conveyance

In an Equitable conversion, a purchaser of real property becomes the equitable owner of title to the property at the time he signs a contract binding him to purchase the land at a later date. The seller retains legal title of the property until the date of conveyance.

Earnest-money deposits are actually not required. An earnest money deposit from the buyer(s) customarily accompanies an offer

to buy real estate. The amount can be a small fraction of the total price.

Now, simply putting down the earnest money does not mean that the binding contract has been entered into. If the contract is binding and the buyer does not fulfill his obligations under the contract, the earnest money is forfeited.

5) Relationships after Conveyance

The condition of premises should be specified in the land contract. If the contract contains a general disclaimer of liability such as "property sold as is", the disclaimer will not excuse the seller from liability from fraud or failure to disclose.

On title problems when the property is unmarketable, the seller has until the date set for closing to get title marketable. However, if he does not have a marketable title at date of closing, the buyer may rescind contract and ask for damages or refund.

Damages are the difference between the market price and the contract price. And a refund usually involves the refund of mortgage payments and deposits.

The buyer may also ask for specific performance as the remedy. Equitable remedy is asked for when money damages are insufficient. In this case, a buyer may ask the seller to make the title marketable. At the same time, if the buyer is unable to close, then he will lose his deposit.

Real Property Mortgages.

Types of Security Devices

The first type of security device is, of course, "Mortgages".

Mortgages are the conveyance of a security interest in land, intended by the parties to be collateral for the repayment of a monetary obligation.

Debtor is the Mortgagor, and Creditor is the Mortgagee

There are various names for a Legal Mortgage:

The note

The mortgage deed

A security interest in land

The deed of trust

Or a sale leaseback

The second type is "Land Contracts as Security Device or Security Deed": the Security Deed gives the Lender a "security interest" in property or real estate, providing the Lender the opportunity to seize the property in the event of default by the Borrower.

If the court concludes that the deed was really given for security purposes, it will treat the deed as an "equitable" mortgage.

The third type is the "Absolute Deeds as Security or Equitable Mortgage". Instead of executing a legal mortgage, mortgagor gives the creditor the deed to the land he is mortgaging. In this case, Parol evidence is freely admissible to show parties true intent.

If the creditor sells the property to a 3d party, the 3d party prevails if he is a bona fide purchaser and the Debtor's only option is to sue the creditor for fraud.

A mortgage involves the transfer of an interest in land as security for a loan or other obligation.

2) Some Security Relationships

Sometimes the mortgage is based on necessity. If a person is not able to get things of necessity such as renting a house, he can purchase the house with a mortgage even with a bad credit.

There are several mortgage theories:

Title

Lien

And intermediate

Title theory of mortgage states that the title to the security interest rests with the mortgagee.

Lien theory of mortgage states that the legal title remains with the mortgagor unless there is foreclosure.

And the Intermediate theory of mortgage states that the legal title remains with the mortgagor until there is a default on the mortgage whereupon the title theory applies

For Example:

Paul, John, and George are joint tenants

Suppose now that Paul mortgages his interest in the joint tenancy
Will this sever the joint tenancy as to Paul's interest?

The answer is Yes, in the minority states that follow the title theory of mortgages

And the answer is No, in the majority states that follow the lien theory of mortgages, whereby a joint tenant's execution of a mortgage on his interest will not sever the joint tenancy

Now we are entering into a very important section: rights and duties prior to foreclosure.

Once a mortgage has been created, until foreclosure, debtor mortgagor has title and the right to possession.

Creditor mortgagee has a lien, which is a right to look to the land if there is a default.

Moreover, all parties have the right to transfer their interest in the mortgage.

The creditor mortgagee can transfer his interest by endorsing the note and delivering it to transferee or by executing a separate document of assignment

Debtor Mortgagor also has the right to redeem. Equitable Redemption means that at any time prior to the foreclosure sale, the debtor has the right to redeem the land and free it from the mortgage.

Once a valid foreclosure has taken place, the right to equitable redemption is cut off.

To exercise the right to equitable redemption, the debtor must pay off the missed payment, plus interest & costs.

Sometimes the mortgage contract has an acceleration clause, which permits the mortgagee to declare the full balance due in the event of default. If the mortgage contains an acceleration clause, the full balance, plus interests and costs, must be paid to redeem.

About clogging equity of redemption, a debtor or mortgagor may not waive the right to redeem in the mortgage itself. The Statutory Redemption gives the debtor-mortgagor a statutory right to redeem from some fixed period after the foreclosed sale.

During the statutory redemption period, the mortgagor has the right to possession of Blackacre and the amount to be paid is the foreclosure sale price.

3) Transfers by Mortgagor

Transfers can be done by a mortgagor or a mortgagee. In Transfers by mortgagor, taking a property can be "subject to" a mortgage or can assume a mortgage

If the buyer assumes the mortgage, both the owner and the buyer are personally liable when default happens. The buyer is primarily liable, and the owner remains secondarily liable.

If the buyer takes land "subject to the mortgage", he assumes no personal liability and only loses land if default happens. In this case, only the owner is personally liable.

If recorded, the mortgage remains on the land, and thus if the owner does not pay, the mortgage may be foreclosed.

There are rights and obligations associated with the transferor. The mortgage automatically follows a properly transferred note or a proper assignment.

The transfer also involves the application of subrogation and suretyship principles.

Subrogation usually applies to mortgagee's insurance and insurers have the right to recover money they pay out under a claim where the loss has been caused by a third party, who is usually the mortgagor who did not pay back.

Surety, on the other hand, is the person who guarantees the mortgagee that the mortgagor will pay back. If the mortgagor fails to pay, mortgagee can look to surety for payments.

Furthermore, mortgages employ due-on-sale and due-on-encumbrance clauses to prevent the transfer of mortgages. This means that all loans in a mortgage has to be paid once there is a transfer of mortgage.

4) Transfer by Mortgagee

The Creditor-Mortgagee can transfer his interest by endorsing note and delivering it to the transferee OR by executing a separate document of assignment

The buyer will be a Holder in Due Course, or often referred to as HDC, with the following elements:

Note must be negotiable

For Example, it is made payable to the named mortgagee.

Original note must be endorsed, signed by the named mortgagee
The original note, not photocopies, must be delivered to the transferee

The transferee must take the note in good faith without notice of any illegality

And the transferee must pay value for the note

All recording statutes (notice & race-notice) apply to mortgages as well as deeds and mortgages have to be recorded.

If it is recorded, a buyer of land is on record notice.

In a race-notice jurisdiction, it depends on which bona fide purchaser wins the race to record.

5) Discharge & Defenses

HDC can take the note free of any personal defenses that could have been raised against the original mortgagee

Personal defenses include:

Fraud in the inducement

Unconscionability

Waiver

Estoppel

Lack of consideration, etc.

HDC may foreclose regardless of any such personal defenses.

However, it is subject to the Real Defenses that the maker may raise.

Real defenses include:

Material Alterations

Duress

Fraud in the Factum where the maker lies about the instrument

Incapacity

Illegality

Infancy

Insolvency

6) Foreclosure

When the mortgagor fails to pay, the mortgage must foreclose by proper judicial proceeding.

At foreclosure, the land is sold, and sale proceeds go to satisfying the debt.

If the proceeds of the sale are smaller than the amount owed, then the mortgagee can bring a deficiency action against the debtor. On the other hand, if the proceeds of the sale is larger

than the amount owed, then the junior liens are paid off in their priority and any remaining surplus goes back to debtor, while senior liens remain on the property.

2 steps of foreclosure:

You must take off the top Attorneys' Fees, Expenses of Foreclosure and any accrued interest on 1st Bank's mortgage. The sales proceeds are then used to pay off the mortgages in the order of their priority. Each claimant is entitled to satisfaction IN FULL before a subordinated lienholder may take.

The Effect of Foreclosure is also very important. Foreclosure will terminate junior interests to the mortgage being foreclosed but will not affect senior interests.

Junior lienholders will be paid in descending order with the proceeds from the sale, but once foreclosure of a superior claim has occurred, with the proceeds distributed appropriately, junior lienholders can no longer look to the mortgaged property for satisfaction.

Also, those with interests subordinate to the foreclosing party are necessary party and if a necessary party is not joined, his mortgage will remain fixed to the land.

The debtor must be joined to get a deficiency judgment.

Lastly, foreclosure does not affect any interest senior to the mortgage being foreclosed.

The buyer at the sale takes subject to such interest and the buyer is not personally liable on the senior debt.

If the senior mortgage is not paid, however, senior creditor will foreclose.

Titles.

1) Adverse Possession

Adverse Possession is the process of acquiring the Title of other's property without compensation.

The Elements include a continuous and uninterrupted possession for a given statutory period.

The possession has to be Open & Notorious. It has to be actual, which means the entry cannot be hypothetical or symbolic, and it has to be hostile.

The possessor does not have true owner's permission to be there, the possessor's state of mind is irrelevant.

Tacking is allowed in this process. One adverse possessor may tack on his time to a predecessor's time, so long as there is Privity such as:

Blood

Contract

Deed

Or will

No tacking is allowed if there is an Ouster.

Statute of limitations will NOT run against a true owner who is afflicted by a disability at the inception of Adverse Possession.

Common disability includes:

Insanity

Infancy

Or imprisonment

2) Conveyancing by Deed

The title can also be obtained through conveyance by deed. There are 3 Types of Deeds and their covenants for title.

The first, "Quitclaim Deed", contains NO covenants, but in the Land Contract, Grantor does contain implied promises.

These implied promises are a Marketable title AND a Promise not to make any false statements of material facts at the time of closing

The "General Warranty Deed" warrants against all defects in title including those attributable to grantor's predecessors.

Present Covenants include:

Covenant of seisin, which means the grantor promises that he owns the estate

Covenant of right to convey, which means the grantor promises he has power to convey

AND Covenant against encumbrances, which means the grantor promises that there are no servitudes or liens

Furthermore, future covenants include:

Covenant for quiet enjoyment, which means the grantor promises that the grantee will not be disturbed in possession by a 3rd party's lawful claim of title

Covenant of warranty, which means the grantor promises to defend the grantee if there is any lawful claims of title asserted by others

And Covenant for further assurances, which means the grantor promises to do whatever future acts are reasonably necessary to perfect the title, if it later turns out to be imperfect

Lastly, in a "Statutory Special Warranty Deed", grantor makes no representations on behalf of his predecessors in interest.

It contains two promises that grantor makes only on behalf of himself:

One, the grantor Promises that he hasn't conveyed to anyone other than the grantee

And two, that there is a Covenant against Encumbrances

After all, conveyancing by deed passes title from a grantor to a grantee that is lawfully executed & delivered.

To successfully convey by deed, there has to be a grantee, a lawful execution, delivery, and land description.

A Lawful Execution entails a writing, signed by grantor, with description of the land. The description does not need to be perfect, but needs to be unambiguous and a good lead.

Delivery requirement could be satisfied when Grantor physically or manually transfers the deed to the grantee.

There is also a Present Intent Requirement. Standard for delivery is the legal standard, and the test is solely of present intent.

The grantor has to have the present intent to be immediately bound irrespective of whether or not the deed itself has been literally handed over.

Also, the recipient's express rejection of the deed defeats delivery. If a deed, absolute on its face, is transferred to grantee with an oral condition, the oral condition drops out, it is not provable & delivery is indeed accomplished.

For Example, "Blackacre is yours only if you survive me", is an oral condition that will drop out and the delivery is deemed accomplished.

Sometimes the instruction makes an escrow to deliver to grantee after the stipulated conditions are met. Once conditions are met, title passes automatically to the grantee.

Finally, the last necessity for conveyancing by deed is "land description and boundaries".

The description of the land does not have to be perfect as the law requires only an unambiguous description and a good lead.

For Example, "all of Johnny's land." is good enough.

3) Conveyancing by Will

The grantor can bequeath the real property to the grantee, but may fail through ademption, exoneration, and lapse.

A bequest is adeemed or fails when the specifically bequeathed property is not owned by the testator at death.

Exoneration is not favored by court. It means paying off the debt on real property left under the will out of the residuary estate. And it is generally allowed for exoneration of real property only when expressly called for by the testator.

On lapse: property lapses when the legatee does not survive the testator or dies before the legacy is payable.

4) Priorities and Recording

Recording acts exist to protect Bona Fide Purchasers and Mortgagees or Creditors.

Let me break that down. A Bona Fide Purchaser purchases for value and without notice. Donees, devisees, and heirs are not protected unless the shelter rule applies. Value means all that is required is a substantial pecuniary consideration.

On the Bar Exam, paying one half of fair market value satisfies this requirement.

Notice can be broken down into actual and inquiry notice.

Actual Notice is the literal knowledge of existence and the buyer has inquiry notice of whatever an examination of the land would show.

Here, the buyer has duty to inspect. If another is in possession, buyer has inquiry notice. Also, if a recorded

instrument makes reference to another transaction, the buyer is on notice of whatever a reasonable follow-up would show.

The Record Notice definition depends on the Recording Statutes. There is a notice statute and a race notice statute.

In a Notice statute, a conveyance of land shall not be valid against any subsequent purchaser for value, without notice thereof, unless the conveyance is recorded. To prevail, the buyer has to be the first bona fide purchaser, even if he never recorded.

In a Race notice statute, any conveyance of an interest in land shall not be valid against any subsequent purchaser for value, without notice thereof, whose conveyance is first recorded. To prevail, the Buyer must be a bona fide purchaser and win the race to record.

Chain of Title:

To give record notice to subsequent takers, the deed must be recorded properly within the chain of title, which refers to that sequence of record capable of giving notice to later takers.

In most states, the chain of title is established through a title search of the Grantor-Grantee Index.

There are 3 specific Chain of title problems.

First, the Shelter Rule says that one who takes from a bona fide purchaser will prevail against any entity that the transferor-bona fide purchaser would have prevailed against.

If the bona fide purchaser did not have notice, but his transferee did, the transferee "takes shelter" in the status of the bona fide purchaser, even though the transferee is not a bona fide purchaser.

Second, if a deed, entered on the records, has a grantor unconnected to the chain of title, the deed is a wild deed-incapable of giving record notice of its existence.

A wild deed is incapable of being recorded: it is a nullity. The bona fide purchaser will win in both notice and the race-notice.

And third, one who conveys realty in which he has no interest is estopped from denying the validity of the conveyance if he subsequently acquires the interest he had previously transferred.

In chain of titles, an officer of any corporation is presumed to have the power and authority to transfer the real property of the corporation.

Regarding the priorities in mortgages, creditors must record mortgages. Until a creditor properly records a mortgage, he has no priority. As we all know: first in time, first in right.

On the Bar Exam, look for Purchase Money Mortgage, the Mortgage given to secure a loan that enables the debtor to actually BUY that specific now encumbered land. Purchase money mortgage has super-priority over the parcel of land that the mortgage has a security interest in.

Finally, subordination agreements are permissible. By private agreement, a senior creditor may agree to subordinate its priority to a junior creditor.

Torts

Intentional Torts and their General Rules.

In intentional Torts, the defendant must make or be accused of making a voluntary act that has harmed the plaintiff.

Intentional Tort law generally consists of two elements: (1) The harm done by the plaintiff; and, (2) the intent or desire to have done the harm.

Now to define intent. The defendant must act with the desire to cause the consequence, or have a substantial certainty that the tort will occur.

Note that unlike criminal law where minors and the mentally incompetent cannot have the requisite intent in some cases to commit crimes.; in Intentional torts everyone is capable of intent, therefore the children and mentally incompetent will be liable for intentional torts.

Something interesting within Intentional torts is that intent can be transferred from person to person and tort to tort.

In the case of person to person: when there is more than one plaintiff, if the intent is proven to one plaintiff, it is proven to all plaintiffs.

In Tort law there are generally five areas in which transferred intent is applicable:

Assault

Battery

False imprisonment

Trespass to land

And Trespass to Chattels

Within intentional torts, harm is needed but damages are not.

Damages can be nominal. Actual damages, however, are required for:

Trespass to Chattel

Negligent or Reckless Trespass to Land

And Intentional Infliction of Emotional Distress

2) Harms to a Person

The first intentional tort we will cover is "Assault."

Assault happens when there is intent to cause reasonable apprehension of imminent harmful or offensive contact. Put simply, this means the harmful contact that the victim is apprehensive about has to be immediate.

For reasonable apprehension, the plaintiff must show that a reasonable person would have been placed in apprehension UNLESS the defendant knows of the plaintiff's extra sensitivity, and the plaintiff is aware of the defendant's act.

Also, the assault must be of imminent, which means it must cause Immediate NOT future harm, and the defendant must have the actual or apparent ability to cause the harm.

There are Harmful or offensive contact which include:

Punching

Shooting

Or improper sexual touching

No actual contact is needed, hence "intentional" tort.

Remember, words alone are NOT enough UNLESS the defendant is blind or is in the dark.

There is also "Battery". Battery is the intent to cause an offensive or harmful contact with the person of another including any part of the body or anything which is attached to

it such as an object in his hand, a chair he is sitting on or a car he is driving.

Aside from punching and shooting, Intent to cause an offensive or harmful contact can also be set in motion by something that causes contact.

For Example, pulling away a chair when the defendant knows that the plaintiff is sitting down or putting poison in the food the defendant knows the plaintiff is going to eat would be battery.

It is harmful or offensive only if a reasonable person would have found it such unless the plaintiff is extra-sensitive, and defendant knew about it beforehand.

Also, the plaintiff does NOT need to be aware of offensive or harmful contact the occurred either directly or indirectly.

For Example, if kids throwing rocks outside a train that was passing by killed someone inside the train as a result, some may argue that the incident should be intent as reckless.

However, it would count as intentional torts because the kids intended to throw stones into the train and the intent element is satisfied with reckless.

Moving on to "False Imprisonment". The intent to confine the plaintiff within a fixed boundary, where there is No reasonable exit, is considered False Imprisonment. Note that, a person being excluded from an area is not false imprisonment.

In False Imprisonment, actual confinement, directly or indirectly, AND Length of confinement does NOT matter. The plaintiff must be aware of the confinement OR suffer harm or injury from it for it to be considered False Imprisonment.

Intent to confine the plaintiff includes:

Physical barrier such as a locked door

Physical force such as the defendant holding on the plaintiff

Threats of immediate physical force

And invalid use of legal authority

But if a businessman reasonably believes that a theft has occurred, he can make a reasonable detention, in a reasonable manner, for a reasonable period of time. This is called the shopkeeper privilege.

Another type of intentional torts is Intentional or Reckless Infliction of Emotional Distress. It is extreme and outrageous conduct inflicted by the defendant intentionally or recklessly, which causes the plaintiff's emotional distress.

Generally, when it comes to intentional infliction of emotional distress, always assume asking about intentional infliction rather than negligent infliction unless you are told otherwise

Notice that the intent can be intentional OR reckless and the infliction can be an extreme and outrageous conduct where words alone may be enough. Insult or hurt feelings, however, are NOT enough.

Moreover, the infliction can be an extreme and outrageous conduct which arises when the defendant abuses a relationship or position giving the defendant actual or apparent authority over the plaintiff.

For Example, if the defendant is a police officer, school official, landlord, or collecting creditor, the defendant would have actual or apparent authority over the plaintiff.

Like any intentional torts, the plaintiff's sensitivity is NOT considered UNLESS the defendant knows of the plaintiff's extra sensitivity and the plaintiff's severe emotional distress needs actual damages. Nominal damage is NOT enough.

Actual damages include:

Nervous breakdown

Humiliation

Grief

Embarrassment

Or anger

In addition, pregnant, elderly and children are more likely to win in the case of emotional distress.

When the defendant's conduct causes emotional distress of a 3rd Party, in order to have the right to sue, the 3rd party must be a family member of the plaintiff or have sustained physical injury themselves as a result of defendant's actions. The defendant must know, or should know, of the presence the 3rd party.

Remember, Negligent Infliction of Emotional Distress needs bodily harm or injury NOT just mental disturbance.

3) Harms to Property Interests

Trespass to Chattel and Conversion are also part of Intentional Tort, Trespass to Chattel being less serious than Conversion.

Trespass to Chattels is a tort whereby the infringing party has intentionally interfered with another person's lawful possession of personal property, or chattel, and is Liable for any diminished value resulting from their interference.

It's important to know that Trespass to Chattel requires actual damages thus mistake of ownership is NOT defense.

On the other hand, Conversion is a serious interference with Chattel where the defendant exercises dominion or control OR seriously or substantially damages Chattel. The defendant is liable for full value of Chattel at time of conversion. Different from Trespass to Chattel, Conversion can include damages OR replevin, and similar to trespass, mistake of ownership is NOT defense

Let's talk about trespass to land as intentional Tort. Trespass covers intrusions upon, beneath and above the earth in reasonable height.

For the Exam, 3 feet is considered a reasonable height.

And Trespass to land includes:

Physical invasion

Intentional trespass

Negligent or Reckless Trespass

And Accidental Trespass where the plaintiff can be the owner OR tenant of the property

Physical Invasion is the entering of land by a person or tangible object such as gases and microscopic particles.

Intangibles like light, noise and vibration are NOT trespass.

In the case of physical invasion, the defendant enters land and:

Causes another person to enter the land

Throws objects on the plaintiff's land

Remains on the plaintiff's land after being told to leave and/or

Or Leaves objects on the plaintiff's land after being told to remove them

Intentional Trespass, which is assumed unless stated otherwise, requires intent to enter NOT intent to trespass.

Mistake of ownership is NOT defense and the defendant is liable even if NO damages, including nominal damages, are caused. Also,

the defendant has No liability for Negligent or Reckless Trespass UNLESS he causes actual damage to the land or property on land.

In addition, the defendant has NO liability for Accidental Trespass

4) Defenses to Claims for Physical Harms

Consent is defense to all torts. The defendant cannot, however, consent to a criminal act.

If the defendant consents to an act, he does not consent to the consequences. And if the plaintiff consents to being punched and ends up dying from the punch, the consent is still valid because the plaintiff consented to the act.

For Example, if the plaintiff was a boxer and signs consent to being punched in a boxing match. If he later dies in the match from a punch, the consent is valid because the plaintiff consented to the act.

Sometimes there are mistakes. If the defendant was mistaken about consent, but was reasonable in believing that the plaintiff consented, consent is still valid.

There is also implied consent that is formed in 2 situations:

First, when the plaintiff participates in activities known to include physical contact.

Remember that the plaintiff does NOT consent to contact that is prohibited by the rules of the game, EVEN if the player knows that other players are habitual violators of the rules.

The second situation of an implied consent is in an emergency such as when a plaintiff is pushed out of the way of an incoming truck. The plaintiff must have the capacity to understand the consequences of consent, where children, mentally incompetent and intoxicated persons lack capacity to consent.

Invalid Consents include:

Acting beyond the scope of consent

Consent based on duress

Consent based on the plaintiff's mistake IF the defendant knew of the plaintiff's mistake

And consent based on a misrepresentation going to the essence of the touching

Other defenses fall under the category of privileges and immunities.

The first privilege is the protection of self and others. Self Defense is a reasonable force to prevent an intentional torts that the defendant reasonably believes is about to be committed.

If the force is not reasonable and is too much, the defense is invalid. Conduct can be mistaken if belief is reasonable.

There is no duty to retreat in self defense but the modern view is that a person has the duty to retreat unless the defendant is in his own home.

The defendant is NOT liable for injury to innocent bystanders when the defendant is validly using self-defense. In addition, self defense is NOT available to the initial aggressor

There is also defense of others, a reasonable force that may be used to protect a 3rd person, even a stranger.

If the defendant is found reasonable to believe that the 3rd party had rights of self defense, the defendant will NOT be liable if he is mistaken

For Example, if there was an undercover police officer beating up a criminal and you did not know so you beat up the police officer in protection of the criminal, you are not liable for the mistake.

The next privilege is protection of property Interest. In the case of Defense of Land or Chattels, one can use reasonable NON-deadly force to protect property.

When request for return is useless or dangerous, the defendant can use reasonable, non-deadly force to regain possession of a chattel if:

The original taking was illegal

Chattel is in fresh pursuit

AND the tort is currently being committed

When chattel is located on land of the wrongdoer, the defendant can enter the land to reclaim chattel in a reasonable manner after making a demand for return. On the other hand, the defendant has NO right to enter if chattel is on land of another due to owner's fault.

Parental Discipline is also a defense. A Person in charge of children is permitted to use reasonable force to control a child.

Next, Protection of Public Interests is a defense to invasion of privacy and defamation when the plaintiff is a public figure.

The public has rights to know about the general private lives of a public figure, and to defame a public figure, malice intent is required.

The next defense is Necessity. A person may enter property of another if they have a necessity defense.

Private Necessity is when the defendant acts to protect self or small number of persons. The defendant, then, is NOT liable for trespass but liable for actual damage caused to property.

If property owner is mistaken as to whether that person has a privilege of necessity, the property owner will be liable for harm to the entering person and their property.

Private necessity is an incomplete privilege, which means the person is liable for actual damage caused to property in the process of saving his own property.

Public Necessity is when the defendant acts to protect the public. The defendant then is NOT liable for trespass or damage to property UNLESS he acted unreasonably.

Here is an interesting note: the government is immune to intentional torts lawsuits.

In privilege of warrantless arrest, a police officer may have privilege to make a warrantless arrest.

For misdemeanors, a police officer can make a warrantless arrest for breach of peace in presence of the defendant.

Also, in the case of felony, a Police Officer must reasonably believe that a felony has been committed and that the person being arrested committed the felony. The officer can make reasonable mistakes without punishment.

And Private Citizens must reasonably believe that the person arrested committed a felony.

Remember, a felony MUST have been committed.

Though private citizens can make reasonable mistake as to the identity of the felony, there can be NO mistake as to whether the felony occurred.

Harm to Economic interests, and Dignityy.

In Law, defamation is the communication of a statement that makes one or more false claims, expressly stated or implied to be factual, which may harm the reputation of an individual, business, product, group, government or nation.

1) Defamation

Only a living person can bring a defamation action.

If a statement is not defamatory on its own, the Plaintiff may plead additional facts as inducement to establish defamatory meaning by innuendo.

There are 3 types of defamation.

The first type is a "Libel", which is written content including statements on TV, harmful statement in fixed medium, oral repetitions of a libel, or written repetition of a spoken statement

The second type of defamation is "Slander". Slander is defamation in which the defamatory statement is made orally. Actions require proof of special damages unless the slander constitutes slander per se such as charging the Plaintiff with a crime, a loathsome disease, sexual misconduct or business incompetence.

The third type of defamation is "Private Person and Public Concern". If the Plaintiff is a public figure or if the Plaintiff is involved in a public controversy, then clear and convincing evidence of malice and falsity is required. On the other hand, if the Plaintiff is a Private Person and does NOT involve public concern, you do NOT need to prove falsity, malice or negligence.

There are 3 ways to defend defamation.

The first way to defend defamation is by Truth, when the Plaintiff does not need to prove truth, which is a statement

about a purely private matter, the Defendant may prove truth as a defense

The second way to defend defamation is by Absolute Privilege.

There is NO liability for statements made:

From spouse to spouse

In a judicial proceeding

By executive branch officials

OR By legislators in hearings or floor debates

The third way to defend defamation is by Qualified Privilege.

There is NO liability for:

Employers and professors giving recommendations as long as there is reasonable belief that the information is correct

The Defendant's response to a request by the Plaintiff

Persons reporting crime and credit bureau reports

If the Defendant has a qualified privilege, the Defendant is liable if:

He acted with malice

He engaged in excessive publication

OR the statement is unrelated to policy of privilege

2) Invasion of Privacy

It is a legal term essentially defined as the unlawful intrusion into the personal life of another person without reasonable cause and includes a non-public person's right to privacy from commercial misappropriation, unreasonable intrusion into the Plaintiff's affairs or seclusion, public disclosure of private facts, and false light

Commercial Misappropriation is commercial use of the Plaintiff's name or picture for the Defendant's gain or commercial advantage without the Plaintiff's consent.

Unreasonable intrusion into the Plaintiff's affairs includes intrusion into something private, which is objectionable to a reasonable person.

For Example, wire tapping the Plaintiff's phone lines, reading his private mail, and repeated phone calls made to him.

No communication to a 3rd person is needed for unreasonable intrusion.

Public disclosure of private facts is public disclosure of embarrassing private information.

This includes making the facts below public: facts that are true, facts that a reasonable person would NOT want to be made public, facts that are not generally known about the plaintiff and facts that are NOT public record or of legitimate public interest.

To defend public disclosure of private facts, look for the newsworthiness of the invasion and public records.

False Light is a statement which gives the public a misleading impression of the Plaintiff about views he does not hold or actions he did not take. False Light includes Publication of facts which place the Plaintiff in a false light. Furthermore, false light is objectionable to a reasonable person AND malice on part of the Defendant if the Plaintiff is a public figure

For invasion of privacy, actual consent is the only defense, which does not include a reasonable belief of consent.

3) Intentional Misrepresentation

It basically means fraud, deceit or false misrepresentation of a material fact.

Opinion is NOT actionable unless it is made by an expert and Silence is NOT actionable and there is NO duty to disclose UNLESS there is a fiduciary relationship or a duty to correct earlier misinformation.

Examples of fiduciary relationship include:

Majority/minority shareholder
Executor of estate/beneficiary
Bank/depositor, Family members
Or principal/agent

The intent to deceive, reckless disregard for the truth, intent that the Plaintiff rely, reasonable reliance AND actual damages make up Intentional Misrepresentation.

Negligent Misrepresentation is the misrepresentation of fact as a result of the Defendant's negligence and it only covers misrepresentations made by professionals such as an accountant.

4) Tortious Interference with Contract

It occurs when a person intentionally damages the Plaintiff's contractual or other business relationships.

To make up a tortious interference with contract, there must be a valid contract with a 3rd person, the Defendant must know about it and intentionally interferes with contract, and the Plaintiff must suffer actual damages.

Contract at will or prospective contract is when the Defendant uses wrongful tactics.

For Example, violence would count as using wrongful tactics.

Negligence is the most important topic in Torts because it makes up 50% of all Torts questions on the MBE.

1) Elements

Negligence requires:

A duty of care owed by defendant to protect plaintiff from an unreasonable risk of injury and a breach of that duty by defendant

That the breach is an actual and proximate cause of Plaintiff's injuries

And lastly, that damage is a result of that breach

2) Duty of Care

On the Bar Exam, look at Duty owed.

One may have negative Duty which is Duty NOT to act in a manner that would create an unreasonable risk of harm to others in foreseeable Plaintiff's zone of danger.

Remember, the Defendant only owes Duty to the Plaintiffs who are foreseeably within the risk of harm created by the Defendant's conduct

On the Bar Exam: A special situation that often appears is when a third person is involved as a rescuer.

The defendant will be liable for any harm to the rescuer or a stranger harmed by the rescuer. The risk of harm is foreseeable as long as the rescue is reasonable.

Prenatal Injuries can be negligence also. If the Defendant fails to diagnose defect or negligently performs a contraceptive procedure, parents can sue for medical expenses and pain and suffering during labor.

Finally, Intended Beneficiaries of Economic Transactions are always considered foreseeable plaintiffs. So a hired security guard owes duty to those who hired him.

The general rule is that there is no duty to aid someone in need of help unless a special relationship exists.

Examples of special relationship:

School and Student

Common carrier and Passenger

Innkeeper and guests

Landlord and Tenant

Law enforcement and Prisoner

Hospitals and Patients

Employer and employee

Parent and child

Business and Customer

Social Host and Guest

Remember, even doctors have NO duty to aid others if there is no doctor/patient relationship.

Regarding "Duty When the Defendant Creates Risk", there is No duty for someone to warn others of a risk UNLESS they are responsible for an act, even if it is accidental, and then realizes (or should realize) that it has created an unreasonable risk of physical harm to another.

Furthermore, Good Samaritan rule is that if one begins helping someone, he has to complete the help with reasonable care.

Some states limit liability to gross negligence.

Good Samaritan prevents a scenario like this: People see a victim but decide to leave the victim after seeing that a person, the Defendant, has started helping the victim. Now, if the Defendant leaves halfway, then the victim is left with no one to help.

The last scenario of duty owed in negligence is the Conduct of 3rd Persons. There is NO duty to control the conduct of a 3rd person so as to prevent him from causing physical harm to another UNLESS there is a special relationship

Again, special relationships include:

School and Student where the Teacher has duty to control actions of a student

Common carrier and Passenger
Innkeeper and Guests
Landlord and Tenant
Law enforcement and Prisoner
Hospitals and Patients
Employer and Employee
Parent and Child

And when Dram Shop Laws apply, a tavern is liable for serving alcohols to visibly intoxicated persons or minors who subsequently cause death or injury to third parties.

There is a Reasonable Person Standard of Care in the duty of care.

The Defendant's conduct is measured against what a reasonably prudent person would do. Do NOT consider the Defendant's characteristics.

Children are held to reasonable standard of a child of like age, education, intelligence, and experience.

Also, if a child is engaged in adult activity, he is held to adult standard.

While people with greater knowledge and experience will be considered, people with lower intelligence are not held to a lower standard.

Physical disabilities, however, are considered.

For Example, a reasonable blind person would use standard for blind persons.

Sometimes Special Standards of Care are required. Professionals are held to the standard of care of a member of the profession in good standing in the same or similar community, and Specialists are held to a national standard.

Use Guest Statute only if you are told it applies and it only applies when a guest is suing a driver, not when a driver is suing another driver.

A driver owes Duty to his passenger even when the passenger does not pay. However, the duty is less than reasonable care and thus is only liable for gross negligence or reckless conduct.

A Gratuitous Passenger who is getting free service is a Licensee and the driver has Duty to warn the passenger of known dangers.

For Example, a Paying Passenger might pay for gas or toll, is an Invitee and the driver has duty to inspect premises AND duty to make premises safe.

In the case of an Emergency, the Defendant must act as a reasonable person would under the same Emergency conditions.

Remember, an emergency is NOT to be considered if it is of the defendant's own making.

As a part of duty of care for negligence, we are going to talk about the owner's duty to those off premises.

If the Plaintiff is injured by Natural Conditions, the Defendant has NO duty owed unless, for example, the Plaintiff is injured by a decaying tree next to the sidewalk owned by the Defendant. In this situation the Defendant would still owe Duty.

However, if the Plaintiff is injured by Artificial Conditions, the Defendant has NO duty UNLESS the Plaintiff is injured by a dangerous condition on the edge of the property.

For Example, if the artificial condition were explosives or uncovered holes, the Defendant has Duty.

If the Plaintiff is injured by an Activity, the Defendant is held to Duty of reasonable care with regards to activities conducted on land and will be liable for any unreasonable risk to those off premises.

For Example, if The Defendant was to put clowns on the land adjacent to a highway, he is liable if people are injured while watching the clowns.

For owner's duty to those on premises, if the Plaintiff is an undiscovered trespasser, the Defendant will be held NO duty of care.

When discovered or anticipated, trespassers who are known (or should be known) to the Defendant, come onto his land, he has duty to warn of known dangers.

In the case of Infant Trespassers, which is an attractive Nuisance, Children do NOT need to be attracted to the land.

The Possessor of land is liable for physical harm to trespassing children where

A dangerous artificial condition on the property

Possessor knows or should know that children are likely to trespass on property

Children cannot recognize the danger

AND lastly, expense of making condition safe is slight compared to the danger

Possessor of land has duty to warn Licensees of known dangers.

Licensees include:

Social guests

Person on the Defendant's property for their own economic benefit such as a salesperson

Police and firefighters

Possessor of land has duty to make reasonable inspections of premises, with Inspections done within a reasonable time and make premises safe for Invitees.

Invitees include:

Customers, even if they do not buy anything

Persons accompanying customers

Repair persons

And those entering public buildings

For Example, customers would be people who enter into:

Malls

Churches

Airports

Museums

And hotels

They don't need to purchase anything to be considered as invitees.

Because the duties owed to invitees, licensees, and trespassers are so different, it is very important to identify the category a person falls under before you determine the owed duty.

In torts, the Defendant has no liability in negligence unless proven that he owes the Plaintiff a duty of care AND that there has been a breach of that duty.

3) Breach of Duty

In breach of duty, the Burden is on the Plaintiff to prove breach by direct or circumstantial evidence.

Custom or Usage can be used by the Plaintiff or the Defendant to prove breach of duty.

Defendant's compliance with customs does not always make him win because the customs may be unreasonable.

Violating a statute is proof of a breach. It is Negligence Per Se, meaning as long as the Defendant violates a statute, he has committed negligence. The violation must be unexcused.

The defendant may prove excuse if he can show that violated statute can or would have prevented a greater harm.

The Plaintiff must be a member of the class of persons intended to be protected by the statute AND harm suffered must be of the kind the statute was designed to protect against.

The Defendant's compliance with statute is NOT conclusive; he may have to go beyond statute requirements.

For Example, suppose a contractor did not violate a building code when constructing a house.

The house, however, collapses and somebody was injured. It may not be negligence per se because the contractor did not violate a building code, but it may still be a breach of duty if the contractor was acting negligently.

Next, Res Ipsa Loquitor is a legal term originated from Latin which literally means "the thing itself speaks" and more often translated as "the thing speaks for itself"

Res Ipsa Loquitor signifies that no further details are necessary--the proof of the case is self-evident!

The elements of Res Ipsa Loquitor are:

Accident does not normally happen absent negligence on part of someone

The Defendant was likely that someone

AND Instrumentality was within the Defendant's exclusive control

A finding of Res Ipsa Loquitor raises an inference of negligence on part of the Defendant. The burden of proof is on the plaintiff.

4) Causation

For causation, the Plaintiff must show BOTH actual and proximate causation. Actual Causation has testing and liability issues.

The testing being:

If only 1 tortfeasor, use "but for" test

And If multiple tortfeasors, use substantial factor test

As far as liability, if multiple Defendants are acting jointly, ALL Defendants is the actual cause of the entire injury.

On the other hand, if multiple Defendants are NOT acting jointly AND the negligence of either would have caused the entire injury, each the Defendant is then the actual cause of the entire injury.

For Example, 2 fires are set and either one would have caused the injury. If multiple Defendants are NOT acting jointly AND the negligence of them combined to cause a greater injury than would have resulted from the separate negligence of each, each Defendant is the actual cause of the entire injury.

On the other hand, if multiple Defendants are NOT acting jointly AND the Plaintiff is injured by the negligence of 1 and not both Defendants, and it is impossible to tell which one, BOTH the Defendant's are the actual cause UNLESS one the Defendant can prove the other one was the cause.

Proximate or Legal Causation is an event that is held to be the abundant cause of an injury. In proximate causation, the harm must be reasonably foreseeable and the type of harm must be foreseeable.

As long as the type of harm and the harm is foreseeable, the Defendant is responsible for any unexpected chain effect of that harm due to Plaintiff's prior condition. This is called the egg-shell rule.

There is NO proximate cause for economic harm to 3rd persons

Proximate causation includes Intervening Events, which is defined when there is a 3rd person conduct or an event that occurs after the Defendant's tort and causes more harm.

The Defendant will still be liable if it was foreseeable, and if A negligently injures B, A is also liable for any new injuries which are foreseeable

Foreseeable injuries include:

Negligence by rescuer

Negligence by a Physician or Nurse

Subsequent Accidents

Subsequent Diseases

Negligence by third Persons

And Normal weather changes

Unforeseeable injuries are NOT liable because they are superseding causes such as Acts of God, Intentional torts of 3rd persons, and criminal acts of 3rd persons.

There are exceptions though, Acts of God is unforeseeable UNLESS the Defendant knew of the danger and increases the risk and Criminal acts of 3rd persons is unforeseeable UNLESS the Defendant knew of likelihood of danger.

Therefore, stopping a tractor on top of the hill during lightening or leaving your keys in the car would not count as unforeseeable injury.

5) Damages

First of all, actual damages must be proven to have a valid negligence claim.

There are 5 different types of damages:

Pain and suffering

Future damages, which need expert testimony

Diminished earning capacity

Medical expenses; The collateral source rule states that Medical insurance is NOT deducted

And Loss of consortium for married couples only

Negligent infliction of emotional distress need a physical injury or symptom and the plaintiff must either have been impacted or been within the zone of danger and missed being impacted.

This means the Plaintiff must have been close by the zone of danger.

Moreover, modern approach covers the Plaintiff who was present at the scene who views a close family member being impacted.

There are defenses to recovering damages under both the Contributory Negligence Rule and Comparative Negligence Rule.

Contributory Negligence completely bars the Plaintiff's right to recovery, even if there's only a slight negligence.

Comparative Negligence, on the other hand, ONLY applies when 2 negligent parties are suing one another

For the Exam, assume pure comparative negligence unless told otherwise.

Even if the Plaintiff is contributory negligent, the Plaintiff can recover a percentage of damages. The percentage being the percentage he was not at fault. If the Plaintiff is more than 50% contributory negligent, the Plaintiff gets nothing. This case is called Modified Partial Comparative Negligence.

Assumption of risk is another defense, which bars a plaintiff from recovery against a negligent tortfeasor if the defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risks at issue inherent to the dangerous activity participated in. This defense does not apply to rescuers.

Plaintiff must have actually known of the risk AND voluntarily assumed the risk. Usually, the Plaintiff collects nothing if he had assumed risk. In comparative negligence states, the Plaintiff collects liability but is reduced by amount at fault

On the Bar Exam, look for the first element that before you progress to the next.

For Example, in a negligence action, if you can show no duty, then you do not need to worry about answers dealing with damages, breach, or causation.

Remember that it is possible to act accidentally and still be negligent as long as you breached the duty.

Strict Liability.

Doctrines here make a person responsible for the damage and loss caused by his actions and omissions regardless of his duties.

2) Application

Starting with strict and product liability. Strict liability applies to Abnormally Dangerous Activities, which are ultra hazardous and product liability applies to anyone engaged in selling or leasing products.

An activity is defined abnormally dangerous if it is not usual for the area and cannot be performed without risk of serious harm including:

Radiation

Storing explosives or inflammable liquids

Blasting

And Pile Driving with excessive vibrations

Fireworks do NOT count.

The doer of the activity is liable even if harm is caused by the unexpected conduct of a 3rd person, animal, or act of God.

Product liability is when organizations or individuals who make products available publicly are held responsible for the injuries those products cause.

There is NO strict liability for unavoidably unsafe products such as knives and chemotherapy drugs. And there is also NO strictly liability for services such as blood transfusion or organ transplants.

Product liability applies to anyone engaged in the business of selling or leasing the product such as the:

Manufacturer

Wholesaler

Distributor

Or the Retailer

It does NOT apply to the occasional seller of the product.

When a product is in a defective condition, the buyer must prove that the product was defective when it left hands of the seller. Furthermore, the buyer must prove if the product is defective in its:

Manufacturing

Design

Or Instructions or Warnings

The defect does NOT need to be the result of negligence, it just has to exist.

Furthermore, a product is unreasonably dangerous if there is an inadequate warning. However, the seller is NOT required to place warning in different languages if sold in the U.S.

The seller must give a warning about an ingredient if
The product contains an ingredient to which a substantial number of people would be allergic to

The danger of the ingredient is not generally known

Or the ingredient is known to be one that consumer would reasonably not expect to find in the product

On the other hand, seller does NOT need to give warning when product is only dangerous when:

Consumed in excessive quantities or over a long period of time

Or when the danger is known by the general public such as alcoholic beverages and cigarettes.

Strict liability also applies to the user or consumer, determined by the consumer contemplation test, which means any foreseeable user or ordinary user can recover.

To elaborate, the seller is liable for any foreseeable users, which does NOT have to be the buyer. It could be:

A family member

An employee

A guest

OR a donee

Thieves are NOT foreseeable users.

Here is a real case in the federal court:

A housewife purchased a vacuum cleaner and took it home.

Several weeks later, while her 11-year-old son was riding on the vacuum cleaner, it accidentally was switched on and as a result the young boy's penis was caught in the vacuum, injuring him.

While the young boy was not the purchaser or intended user, being a family member, he is a foreseeable user and as such they were able to win their lawsuit against the seller.

To be liable, products have to reach consumer without a substantial change in the condition in which it is sold.

Example: The seller is therefore not liable if someone substantially changes the product.

So in the case of the "penis sucking vacuum", if the housewife had gone home and modified the vacuum to increase the suctioning power, she would not have recovered.

Also, the buyer or user must show physical injury or damage to property OTHER than the product itself, which means economic loss alone, is not enough.

Another strict liability is that owners of wild animals are liable for harming others and their property. Wild animals are animals that can never be tamed or domesticated including lions, crocodiles and such. Owners of wild animals are strictly liable even when fleeing from the wild animal.

On the other hand, owners of Domestic Animals are NOT strictly liable UNLESS the Defendant has knowledge of the animals' dangerous propensities that are not common to the species.

Also, owners of trespassing animals are strictly liable for reasonably foreseeable damage done by a trespassing animal.

The only defense for strict liability is assumption of the risk, also known as subjective test. The Plaintiff must be aware of the danger AND voluntarily assume the risk. Remember, foreseeable intended use is NOT a defense and there is duty to warn about foreseeable unintended uses.

3) Vicarious Liability: Liability for Acts of Others

Let's look at Respondeat Superior. It is responsibility, held by a superior, for the acts of his subordinate-the violator, or, responsibility held by any 3rd party that had the "right, ability or duty to control" activities of Violator.

Respondeat superior is liable for acts of an employee who is acting within the scope of their employment. This does NOT include commuting from house to work.

The scope of their employment includes doing what they are hired to do:

During work hours

At proper place

And doing what the boss told him to

Even if the Respondeat Superior is found not vicariously liable for violator, he may be liable for negligently supervising employee. If the employer is liable, the Plaintiff can collect from either employer or employee

Employers are NOT liable for independent contractors UNLESS their independent contract is engaged in a non-delegable duty OR if the landlord hires IC to repair and injures someone

Finally, the employer is always liable for an inherently dangerous activity whether or not the employee is independent contractor.

Nuisance

1) Private Nuisance

It is disturbance creating a substantial AND unreasonable interference with one's use and enjoyment of property

It is an unreasonable interference when there has been depreciation in market or rental value of the land.

For Example, odors, noise, vibrations, and light are unreasonable interference.

The disturbance must be annoying, offensive or inconvenient to a normal plaintiff in the community: the Plaintiff's special sensitivity is NEVER considered.

Factors for Determining Unreasonable Interference are
Residential or Commercial Areas

Frequency and time of day

Fears and feelings common to the community

Fear of contagion even if there is no foundation in scientific fact

And coming to the nuisance

For Example, if the nuisance existed before the plaintiff moved into the community, the defendant may not be liable because the plaintiff came to the nuisance.

Remedies of nuisance include:

Payment of damages

And injunction to prevent the Defendant from repeating the activity which caused the nuisance.

Punishment for contempt is specified for breach of such injunction.

2) Public Nuisance

It is an act that unreasonably interferes with the health, safety or property rights of the community. The Plaintiff may only recover if he has suffered a unique damage NOT suffered by the public.

Multiple Party Issues

1) Joint Tortfeasors

Under Joint Tortfeasors is the Joint and Several Liability.

When the combined acts of 2 or more joint Tortfeasors cause an indivisible injury, which is incapable of apportionment, each is held jointly and severally liable

As a satisfaction, payment by one joint tortfeasor reduces the amount the Plaintiff can recover from the other joint tortfeasor.

2) Indemnification vs. Contribution

Indemnification is when the Defendant seeks total reimbursement from another while contribution allows the Plaintiff, who pays

more than his fair share, to get excess payment from other joint tortfeasors.

Lastly, a respondeat superior would count as indemnification.

Survival and Wrongful Death

1) Survival Actions

On the MBE, survival actions and claims for wrongful death should be assumed to be available where applicable. You should also assume that joint and several liabilities, with pure comparative negligence, is the relevant rule unless otherwise indicated.

Now, Survival Actions are actions that preserve for a decedent's estate a cause of action for infliction of pain and suffering and related damages suffered up to the moment of death.

The victim can recover for damages between time of tort and death and damages are paid to the estate of deceased victim.

2) Wrongful Death

Wrongful death can get damages for loss of support, services, companionship and consortium. Damages are paid to surviving family of deceased victim.

Immunities

1) Abolished

Spousal Immunity, Parent Child Immunity and Charitable Immunity are now abolished.

This means:

Spouses can sue each other

Parents and children can sue each other

And doctors and patients of a free clinic can sue each other

2) Governmental Immunity

Federal Government can sue the United States only for negligence. Within Municipal Governments, Governmental functions ARE immune and proprietary functions are NOT immune.

For Example, a parking lot owned by the government is not immune to tort actions.

Bankruptcy Law

Liquidations & Reorganizations

Liquidation bankruptcy is governed by Bankruptcy Code Chapter 7, while payouts, also known as reorganization bankruptcy, is governed by Bankruptcy Code Chapter 11 and 13.

Business vs. Personal Bankruptcy

The purpose for business and consumer bankruptcy varies, where consumer bankruptcy is premised on the idea of a fresh start for an overwhelmed debtor, while business bankruptcy is focused more on saving the business.

In addition, the most common types of personal bankruptcies are Chapter 7 and 13.

Chapter 13 Reorganizations Bankruptcy

1) General Rules

Chapter 13 is a voluntary bankruptcy instituted by an individual who wants to propose a plan to repay his creditors over time. Chapter 13 allows the debtor to keep his assets that otherwise might be sold in a Chapter 7 bankruptcy.

In Chapter 13, the debts may be extended and reduced in amount. When debtors complete the payments, debt not paid is discharged.

2) Best Interest of Creditor Test

A bankruptcy plan can only be approved if it meets the Best Interest of the Creditor.

To meet this test, each creditor must receive, in present value terms, at least as much as what he would receive if the debtor were liquidated under Chapter 7.

Liquidation refers to the process by which a debtor's debts are paid out of current assets, whereas payout refers to the process by which a debtor's debts are paid out of future earnings, and the debtor keeps the assets.

3) Procedure

A case of bankruptcy is commenced by filing a petition.

Now, in Chapter 11 the debtor may continue to operate the business in bankruptcy as a debtor in possession, without having to appoint a separate trustee.

Note however, for Chapter 13 and Chapter 7, a trustee is always appointed, and a trustee may be appointed even in Chapter 11 for

causes including fraud, dishonesty, incompetence, or gross negligence.

Moreover, the plan of reorganization must be approved by the creditor, and the confirmation of the plan by the bankruptcy judge will:

One: Vest title to property of the estate in the debtor

And two: Bind the debtor and all creditors to the terms of the plan even though, under the terms of the plan, certain debts may be reduced in amount and paid over time.

Chapter 7 Liquidations Bankruptcy

1) Effect of Liquidation Bankruptcy

When there is a liquidation bankruptcy, the court appoints a Trustee, who may liquidate the debtor's non-exempt for creditors, and the debtor's debts are discharged.

2) Voluntary Bankruptcy

Individuals and entities may both file for bankruptcy under Chapter 7 with the exception of certain specialized industries. Here, insolvency is not a prerequisite, and the filing of bankruptcy commences the case.

3) Involuntary Bankruptcy

Any debtor who is eligible to file a voluntary petition may be the subject of an involuntary petition in Chapter 7 except for farmers and nonprofit organizations

There are two reasons for filing involuntary bankruptcy:

One: Individual may end the race to the courthouse with other creditors.

And two: Individual may obtain rights or preferences only available in bankruptcy.

Preferences are not illegal or voidable under Texas law, thus preferences cannot be recovered under that law.

Also, only federal bankruptcy laws provide for the recovery of preferences.

There are also two rules for commencing an involuntary case:

One: There are rules on counting the creditors

And two: There are rule on adequate grounds for filing involuntary petition

Breaking it down, on counting the creditors, if the debtor has 12 or more creditors, then 3 or more creditors with aggregate secured or undersecured claims of at least \$13,475 must file for the case to commence.

Undersecured claims occur when debt is more than the value of collateral.

On the other hand, if the debtor has fewer than 12 creditors, then one or more whose unsecured claims aggregate to at least \$13,475 may file to commence.

However, employees, insiders, and creditors who have received transfers voidable by the trustee are not included in counting creditors. Also, the claims in bona fide dispute are not included.

The rules on adequate grounds for filing involuntary petition include:

One: The debtor is generally not paying debts as they come due. This means that the debtor regularly misses a significant number of payments to creditors or regularly misses payments significant in amount in relation to the debtor's operation. Please be reminded that debts in bona fide dispute are not counted.

Two: If a custodian is appointed to take possession or control over substantially all of the debtor's property within 120 days of the involuntary petition, the appointment constitutes adequate grounds.

Bankruptcy Procedure for Chapter 7, 11, 13

1) Debtor Must File

First, to file bankruptcy, the debtor must file:

A list of creditors.

A schedule of assets and liabilities.

And a statement of its financial affairs.

2) Automatic Stay

Secondly, after the filing is completed, automatic stay takes place.

An automatic stay is an automatic injunction which halts actions by creditors, with certain exceptions, to collect debts from a debtor who has declared bankruptcy.

A stay begins at the moment the petition for bankruptcy is filed and applies to creditors whether they know it or not.

Willful violations of the automatic stay can result in damages, attorney fees, and even punitive damages.

Furthermore, creditors cannot do anything that constitutes a collection activity, which prevents the creditors from:

Cutting off service.

Filing suit for nonpayment.

Filing a lien against debtor's property.

Enforcing a lien and seize equipment.

Or selling seized property.

Creditors also cannot do anything that constitutes a collection activity, which prevents:

The IRS from seizing property.

Or a mortgagee or lender from foreclosing on a mortgage.

As mentioned above, there are exceptions to the stay, where the stay does not halt creditors from doing the following.

One: The prosecution of a criminal act.

Two: The establishment or modification of an order for alimony, maintenance, or support. If collection of such establishment is involved, the stay does not stop the collection from property that is not a part of the bankruptcy estate.

Three: The enforcement of government, police, or regulatory powers.

Four: The prosecution of a paternity suit.

Five: An assessment of a tax or demand for tax returns, or a tax audit, and

Or six: Steps to maintain the perfection of a security interest. Moreover, the stay continues for the duration of the bankruptcy unless a creditor requests that the stay be lifted and relief is granted.

A secured creditor is entitled to protection against a decline in the value of the collateral at the time of the bankruptcy during the life of the stay. This is called an adequate protection.

Adequate protection may take the form of a lien, cash payments, or insurance.

However, if adequate protection is not available to protect the lender's secured interest, then the lender has the right to demand that the trustee sell the asset out of the bankruptcy estate, notwithstanding the existence of the stay.

The Bankruptcy Estate

1) General Rules

One: All property of the debtor prior to bankruptcy, including exempt property, becomes the property of the bankruptcy estate.

And two: In a Chapter 7 bankruptcy, all post petition property remains the property of the debtor, not the estate, in exception of inherited property, life insurance, and property received in divorce if received within 180 days of filing the petition.

2) Exemptions

Generally, the purpose of exemptions is to provide a minimum amount of property that a debtor is allowed to keep, even though they are in bankruptcy.

Texas allows its residents to choose between the federal and Texas state exemptions, and the Texas state exemptions are quite favorable for the debtor:

Under Texas state exemption rules, if a debtor has a family, he is allowed to keep up to \$60,000 exemptions, and if the debtor is single, he is allowed up to \$30,000 exemptions.

Exemptions include:

Personal property

Wages, contracts, and benefits

And homestead

Breaking it down, Texas exemptions for personal property include furniture, clothing, tools, jewelry, automobiles, guns and livestock.

However, exemptions do not apply to secured creditors. This means that secured creditors can still get to otherwise exempt properties.

On wages, contracts, and benefits, in addition to the dollar limitations above, a Texas debtor is allowed to keep, free and clear of any limitations whatsoever, other property, such as wages earned after bankruptcy is filed, prescribed health aids, alimony, amounts paid under an insurance contract, and qualified pension benefits.

Finally, the Texas homestead exemption allows a debtor to keep his home without any limitation as to value but with limitation as to the size of the home.

As far as size limitations, it is 10 acres in urban areas, and in the rural areas, it is 200 acres if a debtor has a family or 100 acres if the debtor does not have family.

However, creditors may still reach a debtor's homestead for:

Mortgage.

Taxes owed on the property.

IRS liens.

And home equity loan, provided that all the loans on the house do not exceed 80% of the home's fair market value.

There are new laws regarding homestead:

Under this new law, a person must live in Texas for 2 years before claiming a homestead exemption.

Felons convicted within the last 5 years, non-resident, and other people not qualified under the Texas exemption will have to opt for federal exemption, which is limited to \$125,000.

In addition, only property that has been owned for 3.3 years can be exempted, but if the property that was owned less than 3.3 years was purchased from the sale proceeds of another home in Texas, then a person can tack the ownership period from the homes together and then claim the exemption if the ownership periods equal to at least 3.3 years

Finally, under the 10 Year Look Back Provision , any value in a home during the past 10 years that was obtained to delay, defraud or hinder a creditor cannot be claimed under the exemption.

Powers of Trustee

1) Trustee as a Hypothetical Lien Creditor

Here, the trustee is treated as having a hypothetical judicial lien on the date of the bankruptcy filing, whether or not such a creditor exists.

The trustee may avoid any property interest or claim held by a creditor that could be trumped by a judicial lien creditor who established its lien on the date of the bankruptcy filing.

2) Trustee as a Hypothetical Bona Fide Purchaser for Real Estate

Here, the trustee is given the rights of a bona fide purchaser of the debtor's real property as of the date of filing, whether or not such a purchaser exists.

If a creditor forgets to record, the trustee may avoid the debt.

3) Trustee Claiming Rights of Other Creditors

When a trustee is claiming rights of other creditors, he can avoid any transfer that would also be voidable under non-bankruptcy law by an actual unsecured creditor who has an allowable claim.

The trustee may rely on federal or state law, whichever is more favorable.

4) Trustee's Powers over Fraudulent Transfers

The trustee has powers over fraudulent transfers.

The trustee may avoid transfers that are fraudulent under federal or state law.

State law is generally preferable because the statute of limitations is normally greater than the 1 year period under federal law but greater than 4 years in Texas.

Also, Texas has adopted the Uniform Fraudulent Transfer Act, which lets creditors get back the property that a debtor has given away in a fraudulent transfer, even if the debtor is not in bankruptcy

In addition, a trustee in bankruptcy can also use this state law to void transfers of property made by the debtor and to get the property back in the bankruptcy estate for distribution to all creditors.

Furthermore, the trustee may void conveyances deemed fraudulent under the Bankruptcy Code if it was made within 1 year before the filing date.

Those conveyances deemed fraudulent are:

One: Transfers made with fraudulent intent, which includes transfers made with actual intent to hinder, delay or defraud
Or two: Transfers for less than reasonably equivalent value.
Transfers for less than the reasonable equivalent value are where:

The debtor was insolvent or became insolvent as a result of the transfer,

The debtor was engaged or about to be engaged in business with an unreasonably small amount of capital,

Or the debtor intended to incur debts beyond the debtor's ability to pay as the debts matured.

5) Statutory Liens

Statutory Liens are valid against a trustee in bankruptcy.

6) Trustee's Power to Avoid Preferential Transfers

To elaborate, a trustee or a debtor in possession has avoiding powers, which may be used to cancel a transfer of money or property made during a certain period of time prior to the filing of the bankruptcy petition.

In order to have a voidable preference, the transfer must be made:

To or for the benefit of a Creditor

While the debtor is insolvent

For or on account of an antecedent debt

Within 90 days of filing a petition in bankruptcy

And the transfer must be one enables Creditor to receive more than it would have received by way of its dividend in bankruptcy liquidation

First, the transfer must be made to or for the benefit of a creditor.

A transfer to or for the benefit of a creditor occurs when the debtor, before filing bankruptcy, makes a transfer to some creditors while not making a transfer to other creditors.

Here, the trustee may get back the payments made to the preferred creditors and distribute them among all creditors, and it does not include the transfer of a security interest.

Second, the transfer must be made while the debtor is insolvent. There is a presumption that the debtor is insolvent during the 90 day period prior to filing bankruptcy.

Third, the transfer must be made for or on account of an antecedent debt.

Here, the debt must have been in existence before the transfer to the creditor took place. They cannot be contemporaneous.

If perfection occurs within 10 days of the initial grant of the security interest, then the transfer of the property is deemed to occur at the initial grant of the security interest, thus not falling under the definition of an antecedent debt

On the other hand, if perfection occurs after the 10 day period, the transfer is deemed to occur at the time of perfection, thus making it an antecedent debt.

Fourth, the transfer must be made within 90 days of filing a petition in bankruptcy.

A 1 year rule applies if the transfer is to an insider, such as a family member or shareholder of a corporation. In other words, any transfer made within 1 year prior to bankruptcy to an insider can also be a voidable preference.

And fifth, the transfer must be made so that it enables the creditor to receive more than it would have received by way of its dividend in bankruptcy liquidation.

If the transfer plus the bankruptcy distribution is greater than the bankruptcy distribution that the creditor would have received had the transfer not occurred, then the creditor will receive more than it would by way of the dividend in bankruptcy liquidation

For Example, fully secured creditors will never have a preference, since they would have received 100% in any event. That concludes the five requirements of the transfer in order to have a voidable preference.

Although not commonly tested, let's look at the 4 exceptions of voidable preference rule.

First exception: Transfer in the ordinary course of business or financial affairs is not voidable.

For Example, purchase money transfer of utility bills received 2 months before is not voidable.

Second: Purchase money secured interest is not voidable to the extent that it secures new value if it is perfected within 20 days after the debtor receives possession of the collateral.

Third: Under the net result rule, if the creditor makes an advance after the debtor makes a voidable preference to the creditor, the new value is subtracted from the preference to arrive at a net result.

And four: Floating liens on inventory and accounts receivable are not voidable.

A floating lien is a security interest that attaches to after acquired inventory and accounts, and a security interest in inventory and accounts receivable is vulnerable as a preference only to the extent that the creditor's position is improved during the 90 day period.

Statutory liens may not be voided as preferences. Alimony and child support are not preferential transfers, and transfers by consumer debtors are not avoidable if the aggregate value of all property transferred to a single creditor is less than \$600.

7) Trustee's Power as to Executory Contracts

Executory contract is a contract not yet completed or performed.

Generally, a trustee has the power to assume, reject or assign contracts upon the approval of the bankruptcy court. Clauses prohibiting assignment are held invalid. The trustee may also reject burdensome contracts. Upon rejection, the bankruptcy estate must pay damages for the breach. Also, assignment is approved if the assignee can give adequate assurance of future performance and prompt satisfaction of damages already incurred by the non-debtor party to the contract. However, assignment cannot assign contracts for personal services.

Also, the debtor may opt to perform under the contract.

8) Order of Claim Payment

Claims in the higher priority are paid in full before claims in a lower priority receive anything.

There are secured claims and secured judicial lien creditors.

The claim is secured up to the value of the collateral and includes interest accrued.

If assets are under-secured, they are treated as secured for a portion and unsecured for the rest.

The right of setoff arises when a bank has the debtor's money in a checking account and the debtor owes the bank money on a separate loan.

The bank has the right to set off the loan with the amount in the checking account, but the bank cannot use it to pay off the loan without violating the automatic stay.

Lastly, there are priority claims.

Here, priority refers to the order in which unsecured claims in a bankruptcy case are paid from the money available in the bankruptcy estate. The following list is the order of priority: One: Administrative expenses, which are costs of preserving the estate, post petition taxes and compensation for the trustee's professional expenses.

Example of Professional Expense: Attorney.

Two: Involuntary gap claims, which are claims accruing after an involuntary petition is filed, but before the order for relief or appointment of a trustee.

Three: Wage claims. It is limited to wages earned within 180 days of the petition and to \$10,950.

Four: Contribution to employee benefit plans, which must arise from services rendered within 180 days of the bankruptcy, and is limited to \$10,950 which is reduced by the amount paid to each employee as a wage claim.

Five: Consumer deposits, which are deposits made by a consumer to a seller of property or services, or a lessor of property, for personal, family or household use prior to the seller's bankruptcy is limited to \$2,425.

Six: Alimony and child support.

And seven: Tax claims if tax became due within 3 years of the filing of bankruptcy

As for General unsecured claims, every unsecured claim creditor is paid pro rata.

Judgment Collection Outside of Bankruptcy

1) Execution by a Lien Creditor

Being a judgment creditor alone gives no interest in the debtor's property or income.

To get the interest in the debtor's property or income, the creditor has to go get a writ of execution and have the sheriff levy or execute on a specific piece of the debtor's property.

2) Low Price

Regarding the effect of a low price sale during the process of execution, a low price alone will not invalidate the sale, but it might increase judicial scrutiny for other problems.

3) Lien

Moreover, a lien can apply to after-acquired real property, but steps have to be taken to keep the judgment alive.

4) Garnishment

Garnishment is to go after an asset of the debtor held by a third party, and it creates a temporal net that catches money placed in an account.

Collection typically requires a writ of garnishment, especially if it's an intangible, such as money in a bank account.

Courts are generally more lenient with a garnishee who defaults than they are with a defaulting debtor, especially if the garnishee is a natural person.

The key to a garnishment of a bank account is that banks have the right to set off.

For Example, banks have the right to offset any amount owed to them by the debtor before they pay the creditor.

Here, the setoff language must be in the bank's agreement with the debtor, and setoff is in essence a security interest held by the bank. In other words, the bankruptcy code explicitly treats it as such.

As wage garnishment, a debtor has right to basic food and shelter.

The federal limit set by US Code, Title 15, 1671 on wage garnishment is either 25% of disposable income or 30 times minimum wage, whichever is the lessor.

And lastly, Texas does not permit wage garnishment unless it is for child support.

Discharge

1) Debtors to be Discharged

First, Only Chapter 7 debtors get discharged, and Chapter 13 debtors do not get discharged until payments are completed.

2) Objections to Discharge

However, there are some objections to discharge, which are global objects that keep all debts from getting discharged, which are:

One: When the debtor is not an individual, entities are dissolved and not discharged.

Two: The debtor's fraudulent transfer or concealment of property done within 1 year prior to bankruptcy with the intent to hinder, defraud or delay creditors.

Three: The debtor's failure to keep books and records.

Four: The debtor's commission of a bankruptcy crime, including making a false oath or account, presenting or using a false claim, giving or receiving a bribe, and withholding records or documents.

Five: The debtor's failure to explain a loss of assets.

Six: The debtor's refusal to obey orders or to answer questions.

Seven: The debtor's prior discharge in Chapter 7 within 6 years.

And eight: The debtor's prior discharge in Chapter 13 within 6 years, unless the debtor proposed to pay at least 70% of its claims in the prior case.

3) Exceptions to Discharge

One: Tax claims entitled to priority that are less than 3 years old.

Two: Debts incurred by fraud.

Three: Luxury goods obtained with over \$1,225 in aggregate debts owed to a single creditor and incurred within 60 days of filing are presumed not dischargeable

Four: Cash advances on open ended credit to consumers that exceed \$1,225 are also presumed not dischargeable.

Five: Unscheduled debts, which are the debts not reported by debtors.

Six: Embezzlement, larceny and fiduciary's fraud.

Seven: Alimony, maintenance and support.

Eight: Claims for willful or malicious injury to person or property.

Nine: Claims for driving while intoxicated.

Ten: Fines and penalties owed to the government.

Eleven: Student loans, unless they would impose an undue hardship.

Twelve: Debts incurred to pay a federal tax.

Thirteen: Property settlement from divorce or separation, unless the debtor does not have the ability to pay or will be harmed more than the recipient will be benefited.

Fourteen: Condominium and cooperative fees.

Fifteen: Restitution for a federal crime.

And sixteen: Debts resulting from a violation of securities fraud laws.

4) Reaffirmation of Discharged Debts

When the discharged debtor agrees to pay his debts, the repayment agreement is only enforceable if all of the three elements are met.

One: The agreement must be made before the granting of discharge.

Two: Agreement must clearly and conspicuously state that reaffirmation is not mandatory and that the debtor has the right to rescind prior to discharge or within 60 days after the agreement is filed.

And three: Either a reaffirmation hearing must be held or the debtor's attorney must file an affidavit with the court stating that the debtor has been advised of the consequences and that it is in the debtor's best interest to reaffirm this debt.

An individual must receive a briefing from an approved non-profit budget and credit counseling agency within 180 days of filing for personal bankruptcy. They must file a certificate of completion, and any debt repayment plan that is created.

A debtor's attorney has two duties: (1) The attorney is considered a debt relief agency; and, (2) Has a duty to investigate and inquire into the debt.

A chapter 13 bankruptcy is a voluntary bankruptcy instituted by individuals who want to propose a plan to repay creditors over time.

Under a Chapter 13 plan debts of the debtor may be extended and reduced.

In order for the Bankruptcy court to approve a chapter 13 plan; the plan must meet the best interest of the creditors test in present value terms.

The requirements in order to file a chapter 13 bankruptcy are two fold: (1) The debtor must have a regular source of income; and (2) The Debtor must have non-contingent, liquidated

unsecured debts of less than \$336,900; and secured debts of less than \$1,010.650.

Liquidated in regards to debts means that it is clear as to the amount of the debt.

In cases where the debtor's debt is too much for a chapter 13 plan, then the debtor must either: (1) File a chapter 11; or, (2) File a chapter 7.

The purpose of a chapter 11 plan is to rehabilitate a business or an individual by extending, reducing, or modifying the debtor's obligations.

A trustee is appointed in chapter 11: (1) For cause, including fraud, dishonesty, incompetence or gross management. chapters 7 and 11 always need a trustee.

The judge's confirmation of a chapter 13 plan has two results: (1) Vests title to the property of the estate in the debtor; and (2) Binds the debtor and all creditors to the terms of the plan.

Chapter 7 Bankruptcy is where the debtor's nonexempt assets are liquidated and for an individual debtor the debts are discharged.

A Chapter 7 bankruptcy case will be dismissed in cases of abuse.

Abuse is established by: (1) Filing in bad faith; (2) Establishing lack of good faith by the totality of the circumstances of the debtor's financial situation; and (3) Applying the Means test.

The Means test is where the judge compares the debtor's income for six months prior. If that familial income is not over the median familial income for families of similar size in the state, then the debtor may file for Chapter 7.

Both Individuals and Entities are eligible to file a petition for chapter 7 bankruptcy proceedings.

Furthermore insolvency is not a prerequisite for filing a chapter 7 bankruptcy plan.

Also any party that is eligible to file a voluntary Chapter 7 petition is also subject to an involuntary petition for chapter 7.

The grounds for filing an involuntary petition in Chapter 7 are: (1) The debtor is generally not paying debts as they come due; (2) The Debtor must regularly miss a significant number of payments; (3) Debts in a bona fide dispute are not counted.

Also note that Texas law is the only law that allows preferences. Federal law allows for recovery of preferences, meaning they are against federal law, but not illegal under Texas law.

The automatic stay halts collection activities from the time of the bankruptcy filing, regardless of whether the creditor knows of the filing or not.

There are two common exceptions to the automatic stay: (1) Prosecution of criminal actions; and (2) Domestic Support obligations.

The automatic stay may be lifted in three situations: (1) Lack of adequate protection; (2) Lack of equity; and (3) Scheme to defraud creditors.

All property of the debtor which is acquired prior to bankruptcy becomes part of the bankruptcy estate.

Note however, that inherited property, life insurance, and property received in divorce within 180 days of the petition are the rare examples of post-petition property that becomes a part of the bankruptcy estate.

Furthermore, a Texas resident is allowed to choose between state or Federal exemptions. Note however, that the resident cannot pick or choose, it is all one or nothing.

Exemptions allow the debtor to keep a minimum amount of property, so as to prevent the debtor from becoming a "ward of the state".

The exemption amounts under Texas law are as follows: (1) For family's personal possessions: \$60,000; (2) For an individual's personal possessions: \$30,000.

A secured creditor with a perfected security interest may obtain property which is protected by the exemption.

Note that Texas also affords debtors an additional protection. A Texas debtor is allowed to keep wages earned after bankruptcy, alimony, etc.

For the home stead exemption Texas has the following requirements: (1) For urban properties the value of the house on the property is irrelevant; the homestead simply cannot be more than 10 acres; (2) For rural, again value irrelevant, but the estate cannot be more than 200 acres. Note that this is one of the most generous home-stead exemptions.

But, secured creditors with a properly perfected interest can still reach the assets.

The creditors may still reach a debtor's homestead for: (1) Mortgage; (2) Taxes owed on the property; (3) IRS liens; (4) and home equity loan, provided that all the loans on the house do not exceed 80% of the home's fair market value.

and if the debtor chooses to elect the federal exemptions then the limit to the homestead exemption in federal law applies (\$125,000)

There are new laws regarding the Texas homestead: Under these new laws, a person must live in Texas for 2 years before claiming a homestead exemption. Felons convicted within the last 5 years, non-residents, and other people lacking qualification under the Texas exemption will also have to opt for the federal exemption.

Additionally, only property that has been owned for 3.3 years can be exempted, but if the property was owned for less than 3.3 years was purchased from the sale proceeds of another homestead in Texas, then the ownership period from the two homes may be tacked together, allowing the debtor to claim the exemption if the ownership period equals at least 3.3 years.

Also note that there is a 10 year look back provision, which states that any value in a home during the past 10 years that was obtained in order to: (1) delay; (2) Defraud; or, (3) Hinder a creditor, cannot be claimed under the exemption.

The Bankruptcy trustee has four powers: (1) Hypothetical lien creditor; (2) Hypothetical Bona Fide Purchaser of Real Estate; (3) May claim rights of other creditors; and, (4) May avoid fraudulent transfers.

A trustee, in the capacity of the hypothetical lien creditor may avoid any property interest or claim held by a creditor that would be trumped by a judicial lien creditor.

A secured creditor would prevail over a lien creditor by perfecting by the time the lien is established; or by obtaining a security agreement and filing a financing statement by the time the lien is established. (thus prior to). If a secured creditor has properly perfected, then the secured creditor will prevail over both: (1) General Unsecured creditors; and (2) The trustee of the bankruptcy estate acting in hypothetical lien creditor capacity.

The trustee claims the rights of other creditors to avoid any transfers which would also be voidable under non-bankruptcy law by any actual unsecured creditor. Therefore the trustee of the bankruptcy estate has broad powers.

Under Texas law the statute of limitations for avoiding fraudulent transfers is 4 years. Under the federal law the statute of limitations is 2 years.

The Uniform Fraudulent Transfer Act gives creditors the ability to get property back that was given away in a fraudulent transfer, even when no bankruptcy has been filed. The Trustee also has this right at his disposal.

Thus a trustee may avoid fraudulent conveyances under the bankruptcy code if they are made within 2 years before the filing date. The reason that the federal statute of limitations applies, is because the Bankruptcy Code is federal law.

A transfer made with fraudulent intent are transfers made with the actual intent to: (1) Hinder; (2) Delay; or (3) Defraud a creditor.

Also we must determine whether the transfer is for less than Reasonably Equivalent Value. We can tell this by looking to see: (1) Whether the debtor was insolvent, or became insolvent as a result of the transfer, or was engaged or about to engage in business with an unreasonably small amount of capital, and intended to incur debts beyond the debtor's ability to pay; and, (2) Insider transfers.

Statutory liens are valid against a trustee in bankruptcy.

Now we examine voidable preferences. To find a voidable preference look for: (1) A transfer to or for the benefit of the creditor; (2) Where the debtor is or becomes insolvent; (3) On account of an antecedent debt; (4) Within 90 days of filing the petition in bankruptcy; (5) That allows the creditor to receive more than it would have received in liquidation under chapter 7.

there are exceptions to the voidable preference rule including: (1) Transfer intended as a contemporaneous exchange for new value; (2) Purchase money security interest or PMSI; (3) Statutory liens; and (4) Some Domestic Support obligations.

Note that a preference merely means that one creditor is getting more value than he would have otherwise received under liquidation, and therefore violates the best interest of the creditor's test.

The trustee's power as to executory contracts, is that the trustee may assume, reject, or assign executory contracts upon court approval. Any clauses attempting to prevent this result are deemed invalid.

The order of claim payments are: (1) Secured claims and secured judicial lien creditors; followed by, (2) Priority claims.

The priority claims must come in the following order: (1) Domestic Support Obligation claims; (2) Administrative expenses; (3) Involuntary gap claims; (4) Wage claims; and (5) Contributions to employee benefit plans.

For secured claims the creditor gets up to the value of the collateral, including interest accrued, note however if the collateral is under-secured, anything over the estimated value will be unsecured.

An individual gets discharge of all debts and a fresh start upon discharge.

However, under the following circumstances there will be objections to a discharge: (1) non-individual debtors; (2) Fraudulent transfers or concealment of property; (3) Failure to keep books and records; (4) Bankruptcy crime; (5) Failure to explain loss of assets; (6) Noncooperation; (7) Only one chapter seven or eleven discharge per every eight years.

Furthermore, the following items are not discharged: (1) Tax claims entitled to priority; (2) Debts incurred by fraud; (3)

Certain luxury goods; (4) Cash advances over \$825 in aggregate with 70 days of filing; (5) Unscheduled or (unlisted debts); (6) Domestic Support Obligations; (7) Student Loans.

In order for there to be reaffirmation of a debt, there must be: (1) Agreement made prior to discharge; (2) Creditor must provide the debtor prescribed disclosures; (3) Agreement must be filed with the court; and (4) There must be a reaffirmation hearing.

Business Organizations Texas.

Formation of a corporation requires a person, a paper, and an act.

A person is an organizer, formerly known as an incorporator.

Any person having the capacity to contract for the person or for another may be an organizer of a filing entity.

There must be at least one organizer.

Organizers have to sign and file a certificate of formation.

Paper is the certificate of formation which has to include the following information: (1) Corporate name and address which must include the words: (a) Corporation, company or incorporated; or (b) any abbreviation of those words.

If the corporation does business under a name other than what is in it's certificate it must file an assumed name certificate.

It must file an assumed name certificate with: (1) The secretary of state; and (2) the county clerk in the county of its registered office and principal office; and (3) A corporation cannot sue in Texas until it does so, however the corporation can be sued.

The certificate of formation must also include: (1) Names and address of each organizer; (2) Number of directors and names and addresses of initial directors; (3) Name of registered agent, and address of registered office; and, (4) Period of duration of corporation, if it is not perpetual.

Furthermore the certificate must contain a statement of purpose:

General statement: Incorporating in Texas can occur for any lawful business activity

It can just say that the corporation can engage in all lawful activities;

General business purpose is required to be listed in the certificate.

The certificate can make a specific statement of purpose limiting corporate activity to certain things.

If the corporation acts beyond the scope of its certificate, it is called ultra vires.

Shareholders can then seek an injunction to stop the act.

Responsible officers and directors are liable to corporation for ultra vires losses.

The certificate must contain information about the corporation's capital structure:

In Texas, a corporation may not commence business until it has received, for the issuance of its shares, consideration of \$1,000.

This requirement must be stated in the certificate of incorporation.

Capital structures include: (1) Authorized Stock; (2) Number of shares per class; (3) Par value; (4) Voting rights; (5) Preferences of each class.

Formation also includes an Act. An act is the organizer's act of filing the certificate.

Organizers must sign and file the certificate with the secretary of state.

Filing can be done electronically

a fax signature is also considered valid.

If the certificate is in order:

The secretary of state issues a certificate of incorporation, which is the conclusive proof of incorporation.

At this point, it is a de jure or legal corporation.

Now the Board of directors holds an organization meeting to: (1) Select officers; (2) Adopt bylaws; and (3) transact other company business.

The legal significance of formation of corporations:

Applicable Law: Internal affairs of a Texas corporation are governed by Texas law even if the corporation does business in another state.

Limited liability: Generally, shareholders are not personally liable for debts of the corporation.

Main liability: The corporation is liable for what it does.

Thus a corporation is a separate legal person or entity, which: (1) Can sue and be sued; (2) Can hold property; (3) Must pay income taxes; and (4) Can serve as a partner in a partnership.

A de facto corporation, and corporation by estoppel doctrines: Defacto corporation is one who failed to achieve legal status: (1) Still treated as a corporation; (2) Shareholders are not personally liable for business debts; (3) Good faith requirement: Party asserting either of these 2 doctrines must be unaware of the failure to achieve de jure corporate status.

A De Facto corporation must show: (1) there is a relevant incorporation statute; (2) Parties made a good faith, colorable attempt to comply with it; (3) Some exercise of corporate privileges.

If all requirements are met: De facto corporation is treated as a corporation for all purposes unless it is sued by the state.

Corporation by Estoppel: (1) If one party deals with a business as if it were a corporation: (a) That party may be estopped from denying that it is a corporation; (b) And the business can also be denied from asserting that it is not a corporation--note that this only applies in contract situations.

Now comes Corporate By laws.

General rule: Corporation does not need to adopt by-laws prior to becoming a corporation.

By-laws are: (1) Used for internal governance: that is, lay out responsibilities, meeting times, etc.; and (2) Adopted by board of directors at the organizational meeting.

Bylaws are repealed or amended by a board of directors or shareholders unless: (1) Certificate reserves the power to shareholders only; or, (2) Shareholders, in adopting a particular by-law, expressly provide that directors cannot repeal or amend it.

If the certificate conflicts with the by-laws: Certificate controls.

Pre-incorporation contracts: (1) Promoter is a person acting on behalf of a corporation not yet formed; (2) Liability of the corporation: Corporation not liable until it adopts the contract.

Adoptions can be express or implied:

Express adoption is where the board adopts the contract.

Implied adoption is where the corporation accepts the benefits of the contract.

Liability of the Promoter: (1) Unless the contract clearly provides otherwise, a promoter is liable until there has been a novation; (2) A novation is an agreement between the promoter and corporation as well as contracting party that states that the corporation will be liable; (3) Corporation is liable if it adopts the contract, but even if this happens, the promoter still remains liable until there has been a novation.

The Secret Profit Rule: (1) The promoter cannot make a secret profit on their dealings with the corporation; and (2) If the corporation knows about the profit, it is not secret and the promoter is not liable.

Profit determination: (1) If the promoter acquired the property before becoming a promoter: Then the profit is the price paid by the corporation minus the fair market value; (2) The price paid by the promoter is irrelevant.

If the promoter acquired property after becoming a promoter then the profit is the price paid by the corporation minus the price paid by the promoter.

Corporation's knowledge: (1) If the corporation did not know that the promoter was self-dealing: (a) The corporation may recover any profit made by the promoter in selling the property to the corporation; (2) If the corporation was aware: It may not recover profits because it is no longer considered a secret dealing.

By-laws may cover foreign corporations as well. Corporations which are Incorporated outside of Texas are foreign corporations.

Foreign corporations transacting business in Texas must qualify and pay prescribed fees for: (1) Transacting business: (a) Interstate transactions on a recurring basis; and (b) There is a regular course of business in Texas. (i.e., not just sporadic business activity in Texas).

Foreign corporations have to qualify by being registered with the secretary of state.

Consequences of foreign corporation transacting business without qualifying is a civil fine.

Corporations cannot sue in Texas on a claim arising in Texas when unqualified, however they can be sued.

Once the foreign corporation qualifies for and pays fees, then it can sue in Texas.

Issuance of Stock:

Issuance occurs when a corporation sells or trades its own stock.

Subscription is a written and signed offer to buy stock from the corporation.

Revocation: Pre and post incorporation subscriptions.

Pre-incorporation Subscriptions: (1) Obligations attach when certificates are filed containing a list of subscribers; (2) Irrevocable for 6 months unless: (a) Subscription states otherwise; or, (b) all subscribers agree to the revocation.

Post-incorporation Subscriptions: (1) Obligations attach when the board accepts the offer; (2) Revocable until the board accepts the offer.

Consideration for issuing stock can be tangible or intangible benefit to the corporation: (1) Money; (2) Promissory notes; (3) Discharge of debt; (4) Property; (5) Services already rendered for the corporation; and, (6) contracts for future services.

Anything else is prohibited and the stock becomes unpaid or watered stock.

Amount of consideration:

Par: (1) means minimum issuance price; (2) Par stock is not required.

No par: (1) Means no minimum issuance price; (2) The board can set the price.

Treasury stock: (1) Stock that was previously issued and has been reacquired by the corporation; (2) Corporation can resell it; (3) No minimum issuance price; (4) is treated as no par.

Property or services: (1) When there is an issuance for property or services, the board puts a value on the consideration received; (2) The board's valuation is conclusive unless there is fraud.

Watered stock: (1) Issuing par for less than par value; (2) Directors are liable if they knowingly authorized the issuance; (3) Purchaser is liable.

In cases of watered stock, the transferee is not liable if he acted in good faith. For example: If the purchaser transfers stock to Apple, as transferee, Apple is not liable if he acted in good faith and was unaware of the watered stock. However, if Apple's good faith or lack of it does not affect liability of directors or purchasers.

Preemptive rights: (1) Right of an existing shareholder of common stock; (2) To maintain their percentage of ownership by buying stock whenever there is a new issuance of stock for money.

New issuance is issuance of treasury stock and previously unissued stock.

If the questions do not indicate whether the certificate provides for preemptive rights: (1) Corporations formed on or after November 1, 2003: Preemptive rights do not exist unless the certificate says that they do; (2) On corporations formed before November 1, 2003, Preemptive rights exist automatically unless the certificate says otherwise.

Preemptive rights do not attach if the new issuance is within 6 months of formation of the corporation unless the certificate indicates otherwise.

Directors and Officers.

There are 5 requirements for the board of directors: (1) Number: need one or more natural persons; (2) Election: (a) Directors are elected by the shareholders at the annual meeting; (b) By-laws can provide for classified board which divides board by halves or thirds, with one half or one third elected each year; (3) Removal before the term expires: (a) Shareholders can remove directors with or without cause unless the certificate or by-laws provide otherwise; (b) Removal before term expiration requires a majority vote of the shares entitled to vote; (4) Filling vacancy: Board or shareholders fill a vacancy on the board; (5) Board actions.

There are only two ways that a board can take a valid corporate act: (1) Unanimous written and signed consent to act without a meeting; or (2) a meeting that satisfies quorum and voting: (a) Conference call qualifies if directors can hear each other simultaneously.

If neither way is met, the act is void unless ratified by a valid corporate act.

For meetings there is notice concern: (1) Notice requirements are generally set out in the by-laws; (2) E-mail notice is valid if the director consents; (3) Notice is only required for special meetings.

Failure to notify can be waived: (1) In writing; or (2) by attending without objection.

Proxies and voting agreements are not allowed for board voting.

Quorum requires a majority of all directors unless stated otherwise in the corporate by-laws.

If quorum is present, passing a resolution requires only a majority vote of those present: (1) 9 directors on the board requires at least 5 to attend to constitute a quorum; (2) If 5 attend, at least 3 votes for a resolution to pass; (3) If the director leaves a meeting, statute suggests that a quorum is no longer present and the board cannot act.

Roles of Directors: General Rule: (1) Board of Directors manages the business of the corporation; (2) Managing the business of the corporation includes setting policy, supervising officers, and declaring distribution, etc.

In Close Corporations: (1) The certificate or bylaws can give shareholders management power; (2) Shareholders can manage a corporation directly by having a shareholder agreement if: (a) Certificate provides it is a close corporation; and (b) Certificate or unanimous shareholder agreement provides shareholder management.

Committee of 1 or more Directors: (1) If authorized in the by-laws or certificate, the board can appoint a committee to which it can delegate substantial management power; (2) Committee can declare dividends if the certificate or bylaws allow.

The Committee cannot: (1) Amend by-laws; (2) Select officers; or, (3) recommend a fundamental corporate change to the shareholders.

Thus designating a committee does not relieve other members of the board from liability.

The Director owes the corporation the duties of care and loyalty (fiduciary).

The Duty of Care Standard: (1) Director must act in good faith and exercise ordinary care and prudence; (2) The director must do what a prudent person would do in similar circumstances; (3) The burden is on the plaintiff to show that the director did not abide by the standard.

Nonfeasance (when the director does nothing): will only be liable if his breach caused a loss to the corporation.

Misfeasance based on business judgment rule: (1) When the director does something that causes loss to the corporation, he will not be liable if he acted in good faith based on informed

and rational basis; (2) The court will not second-guess a business decision if so.

Duty of loyalty standard: The director must act in good faith and with a reasonable belief that what he does is in the company's best interest.

Compensation: (1) The board can set its own compensation as long as it is reasonable; (2) If it is unreasonable, then it is a breach of the duty of loyalty; (3) The burden is on the director to show that he upheld the duty of loyalty.

Interested director transaction: (1) Any deal between the corporation and one of its directors, or between the corporation and another business of the director's; (2) It will be set aside unless the director shows: (a) the deal was fair to the corporation when approved; or (b) his interest and the material facts were disclosed and the deal was approved in good faith by: (1) The shareholders; or, (2) a majority of disinterested directors.

Competing ventures: (1) the director cannot compete with his corporation without approval by disinterested directors; (2) if there is no approval, there is a constructive trust put on the profits and the corporation gets the profits.

Corporate opportunity is anything the director has reason to know that the corporation would be interested in.

the director cannot usurp it. Thus the director cannot take a corporate opportunity from the corporation until he: (1) Tells the board; and, (2) Waits for the board to reject it.

Director Usurps opportunity: (1) If the director still has the subject matter of the opportunity. He must sell it to the corporation at his cost; (2) If the director sold it at a profit: He must give the corporation the profit; (3) The corporation can always renounce the opportunity in its certificate or by a board action.

There are three other basis of director liability: (1) Ultra vires: describes act attempted by a corporation that are beyond the scope of the powers granted by the certificate of formation; (2) Improper loans: Director can take a loan from the corporation if it is reasonably expected to benefit the corporation. For example: use loan to take business courses at a school; (3) Improper distributions: (a) Directors are jointly

and severally liable for unlawful distributions to the extent it was impermissible; (b) directors can seek contribution from shareholders who knew it was unlawful when they got it.

A director is presumed to have concurred with board action unless his dissent or abstention is noted in writing in corporate records done by: (1) Having it put in the minutes; (2) Sending a note to the corporate secretary at the meeting; or, (3) sending a registered letter to the corporate secretary immediately after the meeting.

There are two exceptions: (1) Absent directors are not liable; (2) Director has a good faith reliance on: (a) Financial statements or other information represented as correct by an officer; or, (b) information provided by a competent professional, employee, or by a committee of which the Director relying was not a member.

Officers: (1) Owe the same duties of care and loyalty as directors; (2) Corporation must have a president and secretary; (3) one person can hold multiple offices simultaneously.

Officers are: (1) agents of the corporation, so they can bind the corporation by acts within their authority; (2) President has inherent authority to convey real property, but only if the board gives him such authority; (3) The president has inherent authority to bind a corporation to a contract entered in the ordinary course of business.

Selecting and removing officers: selected and removed by directors, not share holders.

Directors set the officer's compensation.

If the directors remove an officer, even when they are liable for breach of contract damages, the officer does not get his job back.

there must be at least 1 president and secretary.

No indemnification from lawsuit: (1) If the directors and officers are held liable for willful or intentional misconduct in performing a duty to the corporation.

Mandatory indemnification: (1) If they are wholly successful on the merits or in defending the claim; (2) directors have to win the whole case.

Permissive indemnification: (1) reimbursement is limited to expenses and attorney's fees if the director is: (1) Held liable to corporation; (2) Or received an improper personal benefit.

To be eligible, the director must show that he acted in good faith and with reasonable belief that actions were in the corporation's best interest.

Eligibility is determined by: (1) majority vote of disinterested board; (2) or independent legal counsel; (3) the court can order reimbursement if the court finds it justified on all circumstances.

The Certificate can limit liability for damages but not for intentional conduct.

Corporation can advance litigation expenses if: (1) The director or officer gives an affidavit and a writing; (2) Promising to repay the expenses if not in good faith.

Shareholders. A shareholder has limited liability and is not liable for acts or debts of the corporation.

There is one exception: Piercing the Corporate Veil: (1) The Court may pierce the corporate veil to prevent fraud or to achieve equity; (2) Courts are more likely to pierce for a tort victim than for a contract claimant; (3) The court will not pierce for contract unless the shareholder made the corporation commit the fraud for their own personal use.

The court may pierce the corporate veil under the following: (1) Alter ego theory: If the shareholder is treating the corporate assets as his own that results in unfairness: (a) Look for evidence of commingling corporate and personal assets; (2) Undercapitalization theory: If the shareholder failed to invest enough to cover their prospective liabilities.

Shareholders cover: (1) Shareholder management of the corporation; (2) Shareholder derivative suits; (3) Shareholder voting; (4) Stock transfer restrictions; (5) Rights of shareholder to inspect books or records of the corporation; and (6) Distributions.

Generally, the board manages the corporation.

However there is the close corporation exception: A close corporation has very few shareholders and shares are not publicly traded.

Shareholders can manage a corporation directly when: (1) Certificate provides that it is a close corporation; (2) and, certificate or unanimous shareholder agreement provides for shareholder management.

Shareholders do not owe each other fiduciary duties as a matter of law. However, the court may find a duty when the majority shareholders are oppressing the minority shareholders.

In a derivative suit, the shareholder is suing to enforce the corporation's claim, and not their own personal claim.

if the corporation has brought this suit it is probably a derivative suit.

For example: Sandy used the board for usurping corporate opportunities. It is a derivative suit because it is a breach of a duty of loyalty owed to the corporation.

The consequences of Derivative suits: (1) recovery in a successful derivative suit goes to the corporation; (2) Shareholders can recover costs and reasonable attorney's fees from the corporation if they win.

If the shareholders lose the derivative suit: (1) Shareholder cannot recover costs and reasonable attorney's fees; (2) the shareholder may also have to pay the corporation's attorney's fees if the suit was brought without reasonable cause. (frivolous claim).

There are four requirements for derivative suits: (1) Stock ownership at a particular time: (a) Shareholders have to own the stock at the time the claim arose; (b) or, the shareholders received the stock by operation of law from someone who owned the stock at the time the claim arose; (2) Shareholders must fairly and adequately represent the corporation's interests; (3) Shareholders must make a written demand on directors that the corporation should bring suit; (a) Shareholders cannot file suit until 90 days after the demand unless: (i) demand is rejected before that; or (ii) Waiting 90 days would cause irreparable damage to the corporation; (4) Demand must set forth the nature of the claim with particularity.

Motion to Dismiss: (1) if the shareholder then sues: (a) Corporation can move to dismiss the suit; (b) Based upon determination by an independent disinterested set of directors, that the suit is not in the corporation's best interest.

The Court will grant the motion to dismiss if it finds the decision: (1) is in good faith; (2) And was made by appropriate disinterested persons; (3) No dismissal or settlement can be granted without court approval.

Shareholder voting: (1) Without a meeting, the shareholders need unanimous consent in writing and signed; (2) Which can be electronic transmission by holders of all their voting shares; or, (3) With meeting that satisfies quorum and voting rules.

Shareholders with the right to vote: record shareholders as of the record date have the right to vote: (1) record holder is a person shown as the owner of the corporate records; (2) The person who owns shares on the record date has the right to vote, regardless if they have since sold the stock.

There are three exceptions to that rule: (1) Treasury stock: Corporation does not vote treasury stock when it was the record owner on the record date; (2) Death of a shareholder: Upon death of a shareholder, the Executor can vote; (3) Proxies are sometimes allowed.

A proxy is a writing signed by record shareholder, directed to the secretary of the corporation, authorizing another to vote the share.

A writing can be by fax or e-mail. And signing by the record shareholder can be done through fax or e-mail.

Proxies are valid for 11 months unless it says otherwise.

A shareholder can revoke a proxy even if the proxy states it is irrevocable, unless it is a proxy coupled with an interest.

An interest is an interest in the shares other than voting. For example, ownership or option.

Pooling votes together: Voting Trusts: (1) A trust whereby the shareholder's voting rights are legally transferred to a trustee; (2) usually for a period of specified time.

To form a valid voting trust there must be: (1) A written trust agreement controlling how the shares will be voted; (2) A copy goes to the corporation; (3) A transfer of legal title of shares to the voting trustee; (4) Original shareholders receive trust certificates and retain all shareholder rights.

the voting agreement must be in writing and a copy is given to the corporation.

Shareholders can agree to vote share to elect each other as directors, but cannot agree what they will do once they become directors.

Directors cannot have a voting agreement.

Voting agreements are enforceable against transferees if the stock certificate notes the agreement.

Meetings are separated into: (1) Annual meetings which must be held. If none is held within 13 months, the shareholder may petition the court to order one; (2) Special meeting which is called by the board for special purposes.

Special meetings may be called by: (1) The president of the corporation; (2) Holders of at least 10% of the shares entitled to vote; or, (3) Anyone else permitted in the by-laws or certificate of incorporation.

A written notice must be given to every shareholder entitled to vote for every meeting, either special or annual: (1) the notice can be given personally, by mail, or by e-mail if the shareholder allows.

A notice must be given between: (1) 10 days; and (2) 60 days before a meeting; (3) Unless the meeting is about considering a merger, then a notice is required 20 to 60 days before a meeting.

The Written notice must contain: (1) When, where and the purpose for the meeting; (2) the purpose stated limits what can be discussed at the meeting.

Failure to give notice results in the action at the meeting being void unless notice is waived by either: (1) Writing and signed or e-mail; or (2) by board and shareholders who attended the meeting without objecting to lack of notice.

There are 5 Quorum requirements: (1) In order to be able to vote, a quorum must be present; (2) Quorum is determined by the number of shares represented and not by the number of shareholders; (3) Quorum requires a majority of the outstanding shares: (a) Certificate cannot change it so that a quorum consists of fewer than 1/3 of outstanding shares; (4) Once a quorum is established, it does not matter if people leave; (5) If quorum is met, a majority of all votes cast wins.

Cumulative voting is only available when voting for directors.

Shareholder votes: Number of shares times the number of directors to be elected.

Shareholders are allowed to concentrate their full share of votes on fewer candidates than there are seats.

A written notice of intent to vote cumulative must be given to the corporation.

Stock transfer restrictions: valid when: (1) Stocks have a restrictions on their ability to be transferred. This is valid if they do not place an undue restraint on the ability to be transferred.

For example, right of first refusal is valid, assuming the corporation offers a reasonable price.

Even when the restriction is reasonable, the transferor cannot get the stock back from the transferee unless: (1) the restriction is conspicuously noted on the certificate; (2) the transferee had actual knowledge of the restriction.

Right of shareholder to inspect books or records of the corporation.

For a shareholder to be eligible to do this, the shareholder must: (1) have owned the stock for at least 6 months; or, (2) own at least 5% of the outstanding shares; (3) All other shareholders need a court order.

The Procedure: (1) the shareholder must make a written demand and state a proper purpose: (a) the corporation has the burden to show that the shareholder's purpose was improper if the corporation refuses to allow the inspection; (b) If the corporation does not allow inspection, the shareholder can get a court order and recover attorney's fees and expenses.

List of shareholders: (1) At least 10 days before a meeting, an officer must prepare a list of shareholders entitled to vote at the meeting; (2) Any shareholder can inspect the list during regular business hours and at the meeting.

Distribution is the act of dividing up the assets or paying out the profits of the corporation.

Discretionary: (1) distributions are declared in the board's discretion; (2) An action by a shareholder to force a distribution requires a strong showing of abuse of discretion.

A corporation cannot make distributions if: (1) It is insolvent, which means it cannot pay its debts as they come due; or, (2) Distribution would exceed surplus; (a) As long as it is not insolvent, and distribution does not exceed surplus--corporation can make distributions even if it lost money the year before.

funds used to pay distributions: (1) Surplus can be used to pay distributions: Thus Assets minus liabilities minus stated capital; (2) Stated capital: (a) cannot be used to pay distributions; (3) par value of stock times shares issued--Any money received in excess of this amount is surplus.

Directors are jointly and severally liable for unlawful distributions.

Directors can seek contribution from shareholders who knew it was unlawful when they got it.

Directors may also be able to raise the defense of good faith reliance upon professional information.

Fundamental Corporate changes.

Generally: (1) To make fundamental corporate changes, there must be: (a) A board action; and (b) Approval by 2/3 of all shares entitled to vote, not just the ones represented at the meeting; (2) there is a dissenting right of appraisal: (a) right of dissenting shareholder to force the corporation to buy his shares at fair value if a fundamental corporate change happens.

This arises when the corporation engages in: (1) Merger; (2) Sale of shares in a share exchange; (3) Transfer of substantially all assets; (4) Conversion.

the dissenting right of appraisal is not available if: (1) the stock is listed on a national stock exchange; or (2) Corporation has more than 2,000 shareholders.

before a shareholder votes, dissenting shareholders have to: (1) File with corporation a written notice of objection and intent to demand payment; (2) And abstain or vote against the proposed change; (3) After the vote, within 20 days, make a written demand to be bought out.

If the corporation and shareholder cannot agree on value, the shareholder can sue and the court will appoint an appraiser.

There are three types of fundamental corporate changes: (1) Amendment of certificate; (2) mergers; (3) Transfer of substantially all assets or share exchanges.

Amendment of the certificate: (1) If the amendment does not affect a class: (a) to make an amendment of the certificate, a board action and approval by 2/3 of the shares entitled to vote is required; (b) If it is approved, it should be then filed with the secretary of state; (2) If the amendment affects a class, it must be approved by 2/3 of the shares in that class, and 2/3 of the shares entitled to vote; (3) Amendment of the certificate does not give a dissenting shareholder rights of appraisal.

Mergers need board actions by 2/3 shareholders' approval by both corporations: (1) No shareholder approval is required for a short form merger; (2) Short form merger: 90% or more owned subsidiary merges into the parent corporation.

If the merger is approved, a certificate of merger should then be filed with the secretary of state.

there is a dissenting right of appraisal for: (1) Shareholders of both companies in a regular merger; (2) Shareholders of subsidiary in a short form merger; (3) The surviving entity gets all rights and liabilities.

Transfer of substantially all assets or share exchange: (1) When one company buys assets of another company or acquires all the stock of another company; (2) Fundamental corporate changes for the selling corporation only, not for the buying corporation.

This requires: (1) board action by both corporations; (2) And approval by 2/3 of the transferring corporation's shareholders: buying corporation does not vote.

There are dissenting shareholder's rights of the appraisal for the transferring corporation only; and the corporation buying assets does not get the liabilities of the selling corporation.

Dissolution: Separated into voluntary and involuntary dissolution.

Voluntary dissolution: (1) A corporation may be dissolved voluntarily by shareholder's consent or a board action. This requires: (1) Written consent of all shareholders; or, (2) Board action and approval by 2/3 of the shares entitled to vote.

After the approval, the president or vice president then files a certificate of dissolution with the secretary of state.

Notice: corporations must send notice of intent to dissolve to creditors.

Fraud: The Court can revoke dissolution if it was dissolved as a result of fraud.

Involuntary dissolution:

Partnerships.

Partnership consists of five parts: (1) Creation of partnerships; (2) Power and liability of partners; (3) Rights of partners among themselves; (4) Dissolution; and (5) Special rules concerning limited partnerships.

A general partnership is a type of business entity where: (1) Partners, with express or implied intent, share profits or losses of the business undertaking; and (2) They all have invested in the business; (3) No formal application is needed for general partnerships; (4) The key is the intent to share profits among partners.

Differentiate general partnership from joint venture: (1) Joint venture is like a partnership but requires express agreement on sharing losses, whereas general partnership does not; (2) Texas courts have ruled that a joint venture requires an explicit agreement on how losses will be shared.

Limited Partnerships require the partners to: (1) File a certificate of limited partnership; (2) Have at least one general partner and one limited partner.

A limited liability partnership or LLP: (1) has elements of partnerships and corporations; (2) All partners have a form of limited liability, similar to shareholders of a corporation; (3) Partners have the right to manage the business directly.

Power and Liability of Partners.

In general partnerships: (1) All partners are 100% liable for debts of the partnership; (2) Partners are separated into: (a) incoming partners; and (b) outgoing partners.

Incoming partners: (1) not liable for pre-existing debts; (2) Any property contributed to the partnership is converted to partnership property and can be used to satisfy pre-existing debts.

Outgoing partners: (1) Not personally liable to subsequent debts; (2) To achieve this, the partner must give timely and proper notice of leaving.

Limited Partnership: (1) A form of partnership similar to a general partnership; (2) Except: In addition to one or more general partners, there are one or more limited partners.

General partners in Limited Partnership have actual authority as agents of the firm to: (1) bind all the other partners in contracts; (2) With third parties that are in the ordinary course of the partnership's business.

Disclosure requirements: (1) Limited partner is only liable to persons he reasonably believes is a general partner; (2) They are transacting business; (3) Belief is based on limited partner's conduct; (4) even if the limited partner has not paid in full of his investment, he is still liable for all disclosed amounts.

Limited Partner Economic Rights: (1) Limited partner is only liable on debts incurred by the firm to the extent of their registered investment; (2) General partners pay limited partners the equivalent of a dividend on their investment; (3) The nature and extent of which is usually defined in the partnership agreement.

LLP: (1) Limited liability is granted to all partners; (2) All investors can take an active role in the management. Note: LP is a subset of non-managing limited partners, unlike LLP.

Rights of partners among themselves.

The general rule is that: (1) There is an agency relationship between every partner; (2) each one of them is both agent and principal to the other.

As for profits and losses: (1) the partnership agreement governs; (2) Absent an agreement, profits are shared equally, and losses are shared the same as profits; (3) Set profits: losses are shared the same as profits; (4) set losses: profits are still shared equally, but losses are shared as set.

Management and control: Absent an agreement, each partner is entitled to equal control by vote.

The duty of care: Duty to exercise reasonable care and obey reasonable instructions.

Duty of loyalty: (1) Partner or agent may not : (a) receive a benefit to the detriment of the principal (self dealing); (b) Usurping: the detriment of the principle's opportunity; or (c) secret profits: Make secret benefits at the partnership's expense.

Dissolution.

Distinguish between winding up and termination.

Dissolution: Partnership continues until the winding up of the partnership affairs is completed.

Process of the partnership's legal existence: (1) Dissolution; (2) Winding up; (3) Termination.

There are three methods of dissolution: (1) Acts of parties; (2) Operation of law; (3) Court order.

Dissolution by act of parties: (1) Partner's act contrary to the agreement.

For example, agreement may state partnership will have a definite life or operate for the attainment of one purpose only and automatically terminate after that is achieved. or the

partner quits before partnership terminates: here dissolution occurs.

(2) the act can be mutual assents of all partners; (3) Expulsion of a partner in accordance with the terms of the partnership agreement. This results in a dissolution, unless the partnership agreement, or a separate agreement, states otherwise.

Dissolution by operation of law: (1) Partnership activity is unlawful; (2) Partner dies; (3) Partner files bankruptcy.

The court orders dissolution when there is: (1) Breach of the partnership agreement: for example, a partner broke the fiduciary duty by neglecting the business or self-dealing; (2) Inability to earn a profit; (3) Incompetence or incapacity of a partner.

Liquidation or winding up.

Liquidation is: (1) The time period between dissolution and termination; (2) The remaining partners liquidate the partnership assets to satisfy the partnership's creditors.

All existing partners have the right to wind up.

Winding up Partners: (1) Are entitled to compensation; (2) Should finalize or complete old business and should not begin or start new business.

Priority checklist for winding up: (1) Outside non-partner creditors; (2) Partners who are creditors; (3) Capital contribution by partners must be paid; (4) Remaining money paid by profit rules.

Termination is the end of the partnership relationship.

Special Rules Concerning LP.

Disclosure requirements: Limited Partners: (1) Have to disclose the amount they are interested in investing at the time of registration; (2) And are only liable on debts incurred by the firm to the extent of their registered investment.

The control limitation: Limited partners generally may not manage or control the business.

Limited Partner Safeharbor: (1) If the limited partner hires someone to advise the general partner or to give a guaranteed note; (2) Limited partner can do so without losing the limited partner protection.

However, under the reliance test: (1) When someone reasonably believes that the limited partner is a general partner and deals with him; (2) Then the limited partner loses the protection and has to be personally liable.

Economic rights of limited Partners: (1) General partners pay Limited Partners the equivalent of a dividend on their investment; (2) The nature and extent of it is usually defined in the partnership agreement.

Formation of a corporation requires a person, a paper, and an act.

A person is an organizer, formerly known as an incorporator.

Any person having the capacity to contract for the person or for another may be an organizer of a filing entity.

There must be at least one organizer.

Organizers have to sign and file a certificate of formation.

Paper is the certificate of formation which has to include the following information: (1) Corporate name and address which must include the words: (a) Corporation, company or incorporated; or (b) any abbreviation of those words.

If the corporation does business under a name other than what is in it's certificate it must file an assumed name certificate.

It must file an assumed name certificate with: (1) The secretary of state; and (2) the county clerk in the county of its registered office and principal office; and (3) A corporation cannot sue in Texas until it does so, however the corporation can be sued.

The certificate of formation must also include: (1) Names and address of each organizer; (2) Number of directors and names and addresses of initial directors; (3) Name of registered agent, and address of registered office; and, (4) Period of duration of corporation, if it is not perpetual.

Furthermore the certificate must contain a statement of purpose:

General statement: Incorporating in Texas can occur for any lawful business activity

It can just say that the corporation can engage in all lawful activities;

General business purpose is required to be listed in the certificate.

The certificate can make a specific statement of purpose limiting corporate activity to certain things.

If the corporation acts beyond the scope of its certificate, it is called ultra vires.

Shareholders can then seek an injunction to stop the act.

Responsible officers and directors are liable to corporation for ultra vires losses.

The certificate must contain information about the corporation's capital structure:

In Texas, a corporation may not commence business until it has received, for the issuance of its shares, consideration of \$1,000.

This requirement must be stated in the certificate of incorporation.

Capital structures include: (1) Authorized Stock; (2) Number of shares per class; (3) Par value; (4) Voting rights; (5) Preferences of each class.

Formation also includes an Act. An act is the organizer's act of filing the certificate.

Organizers must sign and file the certificate with the secretary of state.

Filing can be done electronically

a fax signature is also considered valid.

If the certificate is in order:

The secretary of state issues a certificate of incorporation, which is the conclusive proof of incorporation.

At this point, it is a de jure or legal corporation.

Now the Board of directors holds an organization meeting to: (1) Select officers; (2) Adopt bylaws; and (3) transact other company business.

The legal significance of formation of corporations:

Applicable Law: Internal affairs of a Texas corporation are governed by Texas law even if the corporation does business in another state.

Limited liability: Generally, shareholders are not personally liable for debts of the corporation.

Main liability: The corporation is liable for what it does.

Thus a corporation is a separate legal person or entity, which: (1) Can sue and be sued; (2) Can hold property; (3) Must pay income taxes; and (4) Can serve as a partner in a partnership.

A de facto corporation, and corporation by estoppel doctrines: Defacto corporation is one who failed to achieve legal status: (1) Still treated as a corporation; (2) Shareholders are not personally liable for business debts; (3) Good faith requirement: Party asserting either of these 2 doctrines must be unaware of the failure to achieve de jure corporate status.

A De Facto corporation must show: (1) there is a relevant incorporation statute; (2) Parties made a good faith, colorable attempt to comply with it; (3) Some exercise of corporate privileges.

If all requirements are met: De facto corporation is treated as a corporation for all purposes unless it is sued by the state.

Corporation by Estoppel: (1) If one party deals with a business as if it were a corporation: (a) That party may be estopped from denying that it is a corporation; (b) And the business can also be denied from asserting that it is not a corporation--note that this only applies in contract situations.

Now comes Corporate By laws.

General rule: Corporation does not need to adopt by-laws prior to becoming a corporation.

By-laws are: (1) Used for internal governance: that is, lay out responsibilities, meeting times, etc.; and (2) Adopted by board of directors at the organizational meeting.

Bylaws are repealed or amended by a board of directors or shareholders unless: (1) Certificate reserves the power to shareholders only; or, (2) Shareholders, in adopting a particular by-law, expressly provide that directors cannot repeal or amend it.

If the certificate conflicts with the by-laws: Certificate controls.

Pre-incorporation contracts: (1) Promoter is a person acting on behalf of a corporation not yet formed; (2) Liability of the corporation: Corporation not liable until it adopts the contract.

Adoptions can be express or implied:

Express adoption is where the board adopts the contract.

Implied adoption is where the corporation accepts the benefits of the contract.

Liability of the Promoter: (1) Unless the contract clearly provides otherwise, a promoter is liable until there has been a novation; (2) A novation is an agreement between the promoter and corporation as well as contracting party that states that the corporation will be liable; (3) Corporation is liable if it adopts the contract, but even if this happens, the promoter still remains liable until there has been a novation.

The Secret Profit Rule: (1) The promoter cannot make a secret profit on their dealings with the corporation; and (2) If the corporation knows about the profit, it is not secret and the promoter is not liable.

Profit determination: (1) If the promoter acquired the property before becoming a promoter: Then the profit is the price paid by the corporation minus the fair market value; (2) The price paid by the promoter is irrelevant.

If the promoter acquired property after becoming a promoter then the profit is the price paid by the corporation minus the price paid by the promoter.

Corporation's knowledge: (1) If the corporation did not know that the promoter was self-dealing: (a) The corporation may recover any profit made by the promoter in selling the property to the corporation; (2) If the corporation was aware: It may not recover profits because it is no longer considered a secret dealing.

By-laws may cover foreign corporations as well. Corporations which are Incorporated outside of Texas are foreign corporations.

Foreign corporations transacting business in Texas must qualify and pay prescribed fees for: (1) Transacting business: (a) Interstate transactions on a recurring basis; and (b) There is a regular course of business in Texas. (i.e., not just sporadic business activity in Texas).

Foreign corporations have to qualify by being registered with the secretary of state.

Consequences of foreign corporation transacting business without qualifying is a civil fine.

Corporations cannot sue in Texas on a claim arising in Texas when unqualified, however they can be sued.

Once the foreign corporation qualifies for and pays fees, then it can sue in Texas.

Issuance of Stock:

Issuance occurs when a corporation sells or trades its own stock.

Subscription is a written and signed offer to buy stock from the corporation.

Revocation: Pre and post incorporation subscriptions.

Pre-incorporation Subscriptions: (1) Obligations attach when certificates are filed containing a list of subscribers; (2) Irrevocable for 6 months unless: (a) Subscription states otherwise; or, (b) all subscribers agree to the revocation.

Post-incorporation Subscriptions: (1) Obligations attach when the board accepts the offer; (2) Revocable until the board accepts the offer.

Consideration for issuing stock can be tangible or intangible benefit to the corporation: (1) Money; (2) Promissory notes; (3) Discharge of debt; (4) Property; (5) Services already rendered for the corporation; and, (6) contracts for future services.

Anything else is prohibited and the stock becomes unpaid or watered stock.

Amount of consideration:

Par: (1) means minimum issuance price; (2) Par stock is not required.

No par: (1) Means no minimum issuance price; (2) The board can set the price.

Treasury stock: (1) Stock that was previously issued and has been reacquired by the corporation; (2) Corporation can resell it; (3) No minimum issuance price; (4) is treated as no par.

Property or services: (1) When there is an issuance for property or services, the board puts a value on the consideration received; (2) The board's valuation is conclusive unless there is fraud.

Watered stock: (1) Issuing par for less than par value; (2) Directors are liable if they knowingly authorized the issuance; (3) Purchaser is liable.

In cases of watered stock, the transferee is not liable if he acted in good faith. For example: If the purchaser transfers stock to Apple, as transferee, Apple is not liable if he acted in good faith and was unaware of the watered stock. However, if Apple's good faith or lack of it does not affect liability of directors or purchasers.

Preemptive rights: (1) Right of an existing shareholder of common stock; (2) To maintain their percentage of ownership by buying stock whenever there is a new issuance of stock for money.

New issuance is issuance of treasury stock and previously unissued stock.

If the questions do not indicate whether the certificate provides for preemptive rights: (1) Corporations formed on or after November 1, 2003: Preemptive rights do not exist unless the certificate says that they do; (2) On corporations formed before November 1, 2003, Preemptive rights exist automatically unless the certificate says otherwise.

Preemptive rights do not attach if the new issuance is within 6 months of formation of the corporation unless the certificate indicates otherwise.

Directors and Officers.

There are 5 requirements for the board of directors: (1) Number: need one or more natural persons; (2) Election: (a) Directors are elected by the shareholders at the annual meeting; (b) By-laws can provide for classified board which divides board by halves or thirds, with one half or one third elected each year; (3) Removal before the term expires: (a) Shareholders can remove directors with or without cause unless the certificate or by-laws provide otherwise; (b) Removal before term expiration requires a majority vote of the shares entitled to vote; (4) Filling vacancy: Board or shareholders fill a vacancy on the board; (5) Board actions.

There are only two ways that a board can take a valid corporate act: (1) Unanimous written and signed consent to act without a meeting; or (2) a meeting that satisfies quorum and voting: (a) Conference call qualifies if directors can hear each other simultaneously.

If neither way is met, the act is void unless ratified by a valid corporate act.

For meetings there is notice concern: (1) Notice requirements are generally set out in the by-laws; (2) E-mail notice is valid if the director consents; (3) Notice is only required for special meetings.

Failure to notify can be waived: (1) In writing; or (2) by attending without objection.

Proxies and voting agreements are not allowed for board voting.

Quorum requires a majority of all directors unless stated otherwise in the corporate by-laws.

If quorum is present, passing a resolution requires only a majority vote of those present: (1) 9 directors on the board requires at least 5 to attend to constitute a quorum; (2) If 5 attend, at least 3 votes for a resolution to pass; (3) If the director leaves a meeting, statute suggests that a quorum is no longer present and the board cannot act.

Roles of Directors: General Rule: (1) Board of Directors manages the business of the corporation; (2) Managing the business of the corporation includes setting policy, supervising officers, and declaring distribution, etc.

In Close Corporations: (1) The certificate or bylaws can give shareholders management power; (2) Shareholders can manage a corporation directly by having a shareholder agreement if: (a) Certificate provides it is a close corporation; and (b) Certificate or unanimous shareholder agreement provides shareholder management.

Committee of 1 or more Directors: (1) If authorized in the by-laws or certificate, the board can appoint a committee to which it can delegate substantial management power; (2) Committee can declare dividends if the certificate or bylaws allow.

The Committee cannot: (1) Amend by-laws; (2) Select officers; or, (3) recommend a fundamental corporate change to the shareholders.

Thus designating a committee does not relieve other members of the board from liability.

The Director owes the corporation the duties of care and loyalty (fiduciary).

The Duty of Care Standard: (1) Director must act in good faith and exercise ordinary care and prudence; (2) The director must do what a prudent person would do in similar circumstances; (3) The burden is on the plaintiff to show that the director did not abide by the standard.

Nonfeasance (when the director does nothing): will only be liable if his breach caused a loss to the corporation.

Misfeasance based on business judgment rule: (1) When the director does something that causes loss to the corporation, he will not be liable if he acted in good faith based on informed

and rational basis; (2) The court will not second-guess a business decision if so.

Duty of loyalty standard: The director must act in good faith and with a reasonable belief that what he does is in the company's best interest.

Compensation: (1) The board can set its own compensation as long as it is reasonable; (2) If it is unreasonable, then it is a breach of the duty of loyalty; (3) The burden is on the director to show that he upheld the duty of loyalty.

Interested director transaction: (1) Any deal between the corporation and one of its directors, or between the corporation and another business of the director's; (2) It will be set aside unless the director shows: (a) the deal was fair to the corporation when approved; or (b) his interest and the material facts were disclosed and the deal was approved in good faith by: (1) The shareholders; or, (2) a majority of disinterested directors.

Competing ventures: (1) the director cannot compete with his corporation without approval by disinterested directors; (2) if there is no approval, there is a constructive trust put on the profits and the corporation gets the profits.

Corporate opportunity is anything the director has reason to know that the corporation would be interested in.

the director cannot usurp it. Thus the director cannot take a corporate opportunity from the corporation until he: (1) Tells the board; and, (2) Waits for the board to reject it.

Director Usurps opportunity: (1) If the director still has the subject matter of the opportunity. He must sell it to the corporation at his cost; (2) If the director sold it at a profit: He must give the corporation the profit; (3) The corporation can always renounce the opportunity in its certificate or by a board action.

There are three other basis of director liability: (1) Ultra vires: describes act attempted by a corporation that are beyond the scope of the powers granted by the certificate of formation; (2) Improper loans: Director can take a loan from the corporation if it is reasonably expected to benefit the corporation. For example: use loan to take business courses at a school; (3) Improper distributions: (a) Directors are jointly

and severally liable for unlawful distributions to the extent it was impermissible; (b) directors can seek contribution from shareholders who knew it was unlawful when they got it.

A director is presumed to have concurred with board action unless his dissent or abstention is noted in writing in corporate records done by: (1) Having it put in the minutes; (2) Sending a note to the corporate secretary at the meeting; or, (3) sending a registered letter to the corporate secretary immediately after the meeting.

There are two exceptions: (1) Absent directors are not liable; (2) Director has a good faith reliance on: (a) Financial statements or other information represented as correct by an officer; or, (b) information provided by a competent professional, employee, or by a committee of which the Director relying was not a member.

Officers: (1) Owe the same duties of care and loyalty as directors; (2) Corporation must have a president and secretary; (3) one person can hold multiple offices simultaneously.

Officers are: (1) agents of the corporation, so they can bind the corporation by acts within their authority; (2) President has inherent authority to convey real property, but only if the board gives him such authority; (3) The president has inherent authority to bind a corporation to a contract entered in the ordinary course of business.

Selecting and removing officers: selected and removed by directors, not share holders.

Directors set the officer's compensation.

If the directors remove an officer, even when they are liable for breach of contract damages, the officer does not get his job back.

there must be at least 1 president and secretary.

No indemnification from lawsuit: (1) If the directors and officers are held liable for willful or intentional misconduct in performing a duty to the corporation.

Mandatory indemnification: (1) If they are wholly successful on the merits or in defending the claim; (2) directors have to win the whole case.

Permissive indemnification: (1) reimbursement is limited to expenses and attorney's fees if the director is: (1) Held liable to corporation; (2) Or received an improper personal benefit.

To be eligible, the director must show that he acted in good faith and with reasonable belief that actions were in the corporation's best interest.

Eligibility is determined by: (1) majority vote of disinterested board; (2) or independent legal counsel; (3) the court can order reimbursement if the court finds it justified on all circumstances.

The Certificate can limit liability for damages but not for intentional conduct.

Corporation can advance litigation expenses if: (1) The director or officer gives an affidavit and a writing; (2) Promising to repay the expenses if not in good faith.

Shareholders. A shareholder has limited liability and is not liable for acts or debts of the corporation.

There is one exception: Piercing the Corporate Veil: (1) The Court may pierce the corporate veil to prevent fraud or to achieve equity; (2) Courts are more likely to pierce for a tort victim than for a contract claimant; (3) The court will not pierce for contract unless the shareholder made the corporation commit the fraud for their own personal use.

The court may pierce the corporate veil under the following: (1) Alter ego theory: If the shareholder is treating the corporate assets as his own that results in unfairness: (a) Look for evidence of commingling corporate and personal assets; (2) Undercapitalization theory: If the shareholder failed to invest enough to cover their prospective liabilities.

Shareholders cover: (1) Shareholder management of the corporation; (2) Shareholder derivative suits; (3) Shareholder voting; (4) Stock transfer restrictions; (5) Rights of shareholder to inspect books or records of the corporation; and (6) Distributions.

Generally, the board manages the corporation.

However there is the close corporation exception: A close corporation has very few shareholders and shares are not publicly traded.

Shareholders can manage a corporation directly when: (1) Certificate provides that it is a close corporation; (2) and, certificate or unanimous shareholder agreement provides for shareholder management.

Shareholders do not owe each other fiduciary duties as a matter of law. However, the court may find a duty when the majority shareholders are oppressing the minority shareholders.

In a derivative suit, the shareholder is suing to enforce the corporation's claim, and not their own personal claim.

if the corporation has brought this suit it is probably a derivative suit.

For example: Sandy used the board for usurping corporate opportunities. It is a derivative suit because it is a breach of a duty of loyalty owed to the corporation.

The consequences of Derivative suits: (1) recovery in a successful derivative suit goes to the corporation; (2) Shareholders can recover costs and reasonable attorney's fees from the corporation if they win.

If the shareholders lose the derivative suit: (1) Shareholder cannot recover costs and reasonable attorney's fees; (2) the shareholder may also have to pay the corporation's attorney's fees if the suit was brought without reasonable cause. (frivolous claim).

There are four requirements for derivative suits: (1) Stock ownership at a particular time: (a) Shareholders have to own the stock at the time the claim arose; (b) or, the shareholders received the stock by operation of law from someone who owned the stock at the time the claim arose; (2) Shareholders must fairly and adequately represent the corporation's interests; (3) Shareholders must make a written demand on directors that the corporation should bring suit; (a) Shareholders cannot file suit until 90 days after the demand unless: (i) demand is rejected before that; or (ii) Waiting 90 days would cause irreparable damage to the corporation; (4) Demand must set forth the nature of the claim with particularity.

Motion to Dismiss: (1) if the shareholder then sues: (a) Corporation can move to dismiss the suit; (b) Based upon determination by an independent disinterested set of directors, that the suit is not in the corporation's best interest.

The Court will grant the motion to dismiss if it finds the decision: (1) is in good faith; (2) And was made by appropriate disinterested persons; (3) No dismissal or settlement can be granted without court approval.

Shareholder voting: (1) Without a meeting, the shareholders need unanimous consent in writing and signed; (2) Which can be electronic transmission by holders of all their voting shares; or, (3) With meeting that satisfies quorum and voting rules.

Shareholders with the right to vote: record shareholders as of the record date have the right to vote: (1) record holder is a person shown as the owner of the corporate records; (2) The person who owns shares on the record date has the right to vote, regardless if they have since sold the stock.

There are three exceptions to that rule: (1) Treasury stock: Corporation does not vote treasury stock when it was the record owner on the record date; (2) Death of a shareholder: Upon death of a shareholder, the Executor can vote; (3) Proxies are sometimes allowed.

A proxy is a writing signed by record shareholder, directed to the secretary of the corporation, authorizing another to vote the share.

A writing can be by fax or e-mail. And signing by the record shareholder can be done through fax or e-mail.

Proxies are valid for 11 months unless it says otherwise.

A shareholder can revoke a proxy even if the proxy states it is irrevocable, unless it is a proxy coupled with an interest.

An interest is an interest in the shares other than voting. For example, ownership or option.

Pooling votes together: Voting Trusts: (1) A trust whereby the shareholder's voting rights are legally transferred to a trustee; (2) usually for a period of specified time.

To form a valid voting trust there must be: (1) A written trust agreement controlling how the shares will be voted; (2) A copy goes to the corporation; (3) A transfer of legal title of shares to the voting trustee; (4) Original shareholders receive trust certificates and retain all shareholder rights.

the voting agreement must be in writing and a copy is given to the corporation.

Shareholders can agree to vote share to elect each other as directors, but cannot agree what they will do once they become directors.

Directors cannot have a voting agreement.

Voting agreements are enforceable against transferees if the stock certificate notes the agreement.

Meetings are separated into: (1) Annual meetings which must be held. If none is held within 13 months, the shareholder may petition the court to order one; (2) Special meeting which is called by the board for special purposes.

Special meetings may be called by: (1) The president of the corporation; (2) Holders of at least 10% of the shares entitled to vote; or, (3) Anyone else permitted in the by-laws or certificate of incorporation.

A written notice must be given to every shareholder entitled to vote for every meeting, either special or annual: (1) the notice can be given personally, by mail, or by e-mail if the shareholder allows.

A notice must be given between: (1) 10 days; and (2) 60 days before a meeting; (3) Unless the meeting is about considering a merger, then a notice is required 20 to 60 days before a meeting.

The Written notice must contain: (1) When, where and the purpose for the meeting; (2) the purpose stated limits what can be discussed at the meeting.

Failure to give notice results in the action at the meeting being void unless notice is waived by either: (1) Writing and signed or e-mail; or (2) by board and shareholders who attended the meeting without objecting to lack of notice.

There are 5 Quorum requirements: (1) In order to be able to vote, a quorum must be present; (2) Quorum is determined by the number of shares represented and not by the number of shareholders; (3) Quorum requires a majority of the outstanding shares: (a) Certificate cannot change it so that a quorum consists of fewer than 1/3 of outstanding shares; (4) Once a quorum is established, it does not matter if people leave; (5) If quorum is met, a majority of all votes cast wins.

Cumulative voting is only available when voting for directors.

Shareholder votes: Number of shares times the number of directors to be elected.

Shareholders are allowed to concentrate their full share of votes on fewer candidates than there are seats.

A written notice of intent to vote cumulative must be given to the corporation.

Stock transfer restrictions: valid when: (1) Stocks have a restrictions on their ability to be transferred. This is valid if they do not place an undue restraint on the ability to be transferred.

For example, right of first refusal is valid, assuming the corporation offers a reasonable price.

Even when the restriction is reasonable, the transferor cannot get the stock back from the transferee unless: (1) the restriction is conspicuously noted on the certificate; (2) the transferee had actual knowledge of the restriction.

Right of shareholder to inspect books or records of the corporation.

For a shareholder to be eligible to do this, the shareholder must: (1) have owned the stock for at least 6 months; or, (2) own at least 5% of the outstanding shares; (3) All other shareholders need a court order.

The Procedure: (1) the shareholder must make a written demand and state a proper purpose: (a) the corporation has the burden to show that the shareholder's purpose was improper if the corporation refuses to allow the inspection; (b) If the corporation does not allow inspection, the shareholder can get a court order and recover attorney's fees and expenses.

List of shareholders: (1) At least 10 days before a meeting, an officer must prepare a list of shareholders entitled to vote at the meeting; (2) Any shareholder can inspect the list during regular business hours and at the meeting.

Distribution is the act of dividing up the assets or paying out the profits of the corporation.

Discretionary: (1) distributions are declared in the board's discretion; (2) An action by a shareholder to force a distribution requires a strong showing of abuse of discretion.

A corporation cannot make distributions if: (1) It is insolvent, which means it cannot pay its debts as they come due; or, (2) Distribution would exceed surplus; (a) As long as it is not insolvent, and distribution does not exceed surplus--corporation can make distributions even if it lost money the year before.

funds used to pay distributions: (1) Surplus can be used to pay distributions: Thus Assets minus liabilities minus stated capital; (2) Stated capital: (a) cannot be used to pay distributions; (3) par value of stock times shares issued--Any money received in excess of this amount is surplus.

Directors are jointly and severally liable for unlawful distributions.

Directors can seek contribution from shareholders who knew it was unlawful when they got it.

Directors may also be able to raise the defense of good faith reliance upon professional information.

Fundamental Corporate changes.

Generally: (1) To make fundamental corporate changes, there must be: (a) A board action; and (b) Approval by 2/3 of all shares entitled to vote, not just the ones represented at the meeting; (2) there is a dissenting right of appraisal: (a) right of dissenting shareholder to force the corporation to buy his shares at fair value if a fundamental corporate change happens.

This arises when the corporation engages in: (1) Merger; (2) Sale of shares in a share exchange; (3) Transfer of substantially all assets; (4) Conversion.

the dissenting right of appraisal is not available if: (1) the stock is listed on a national stock exchange; or (2) Corporation has more than 2,000 shareholders.

before a shareholder votes, dissenting shareholders have to: (1) File with corporation a written notice of objection and intent to demand payment; (2) And abstain or vote against the proposed change; (3) After the vote, within 20 days, make a written demand to be bought out.

If the corporation and shareholder cannot agree on value, the shareholder can sue and the court will appoint an appraiser.

There are three types of fundamental corporate changes: (1) Amendment of certificate; (2) mergers; (3) Transfer of substantially all assets or share exchanges.

Amendment of the certificate: (1) If the amendment does not affect a class: (a) to make an amendment of the certificate, a board action and approval by 2/3 of the shares entitled to vote is required; (b) If it is approved, it should be then filed with the secretary of state; (2) If the amendment affects a class, it must be approved by 2/3 of the shares in that class, and 2/3 of the shares entitled to vote; (3) Amendment of the certificate does not give a dissenting shareholder rights of appraisal.

Mergers need board actions by 2/3 shareholders' approval by both corporations: (1) No shareholder approval is required for a short form merger; (2) Short form merger: 90% or more owned subsidiary merges into the parent corporation.

If the merger is approved, a certificate of merger should then be filed with the secretary of state.

there is a dissenting right of appraisal for: (1) Shareholders of both companies in a regular merger; (2) Shareholders of subsidiary in a short form merger; (3) The surviving entity gets all rights and liabilities.

Transfer of substantially all assets or share exchange: (1) When one company buys assets of another company or acquires all the stock of another company; (2) Fundamental corporate changes for the selling corporation only, not for the buying corporation.

This requires: (1) board action by both corporations; (2) And approval by 2/3 of the transferring corporation's shareholders: buying corporation does not vote.

There are dissenting shareholder's rights of the appraisal for the transferring corporation only; and the corporation buying assets does not get the liabilities of the selling corporation.

Dissolution: Separated into voluntary and involuntary dissolution.

Voluntary dissolution: (1) A corporation may be dissolved voluntarily by shareholder's consent or a board action. This requires: (1) Written consent of all shareholders; or, (2) Board action and approval by 2/3 of the shares entitled to vote.

After the approval, the president or vice president then files a certificate of dissolution with the secretary of state.

Notice: corporations must send notice of intent to dissolve to creditors.

Fraud: The Court can revoke dissolution if it was dissolved as a result of fraud.

Involuntary dissolution:

Corporations may be dissolved by court ordered dissolution: (1) Immediate dissolution can be sought by creditors, but only if it is based on irreparable harm to unsecured creditors; (2) Dissolution can be sought by creditors or shareholders.

Dissolution can be sought by creditors if: (1) Corporation is insolvent and the creditor has an unsatisfied judgment; or, (2) the corporation admits in writing that the amount is due.

Dissolution can be brought by shareholders: For insolvency, waste of assets, illegal or oppressive acts by directors, etc.

Appointment of a receiver: (1) can be sought by creditors because the corporation is insolvent; (2) And creditor either has an unsatisfied judgment or the corporation admits in writing that the amount is due.

Appointment of a receiver can be sought by a shareholder for the following: (1) Insolvency; (2) Waste of assets; (3) Director deadlock causing irreparable harm to the company; (4) Shareholders are deadlocked and have failed at two annual meetings to fill a vacant board position; (5) Illegal, oppressive, or fraudulent acts by directors.

A receiver serves for 12 months. If things are not fixed after 12 months, the court can order dissolution.

Administrative dissolution: (1) Secretary of state can dissolve corporation administratively; (2) For failure to pay franchise taxes or perform other required acts.

After dissolution, the corporation still exists, but only for the purpose of winding up, which consists of: (1) Gathering all assets; (2) Converting assets to cash; (3) Paying creditors; and (4) distributing remainder to shareholders.

Abandoning a corporation without dissolving and winding up: (1) Will result in the directors' and officers' being personally liable for debts incurred after forfeiture; (2) Directors manage the winding up process unless the court grants the corporation's motion for court supervision.

Claims arising before dissolution can be asserted within 3 years after dissolution.

Rule 10b-5: Prevents fraud or misrepresentation in connection with the purchase or sale of any security.

Under 10b-5 it is: (1) Unlawful for a person, directly or indirectly, by the use of any means of interstate commerce to: (a) Employ any device or scheme to defraud; (b) Make any untrue statement of material fact, or omit to state a material fact; (2) Engage in any act, practice or course of business that operates as a fraud in connection with the purchase or sale of any security.

the elements include: (1) Intent: either intentional or reckless; (2) engaged in either: (a) material misrepresentation; (b) Failing to disclose material information when it is a duty; or, (c) tipping which is passing along material insider information for a wrongful purpose; (2) Over the telephone or mail, or through a national exchange.

The Plaintiff is: (1) Either securities and exchange commission or (SEC) or a private individual may be a plaintiff; (2) Private individual may only be a plaintiff if he were a buyer or seller of securities.

Possible 10b-5 defendants are: (1) company that issues a misleading press release; (2) Buyer or seller who misrepresents;

(3) Tipper--those who pass along insider information and benefits therefrom; (4) Tippee--those who traded on the tip and knew or should have known it was improperly passed.

Now comes Section 16B.

Generally Section 16B allows the corporation to recover profits gained by certain insiders from buying and selling the company's stock.

Section 16B applies when: (1) Corporation is listed on a national exchange or has at least 500 shareholders and \$10 million in assets; (2) Short swing trading where stock is sold within a 6 month period.

Possible defendants under Section 16B include: (1) director at the time when the stock in question is bought or sold; (2) Officer at the time when the stock in question is bought or sold; (3) Shareholder who owns more than 10% of all shares at the time when the stock in question is bought or sold.

The Consequences are as follows: (1) All profits from short-swing trading are recoverable by the corporation; (2) If within 6 months before or after the sale, the person bought at a lower price, there is a profit; (3) Find damages by matching the lowest purchase price with the highest sale price within 6 months.

Limited Liability Company

1) Nature of the Entity

Forming Limited Liability Company has the benefit of giving investors both the limited liability as a corporation and federal tax benefits as a partnership.

The company's members' full interest is transferable only with majority of other members consenting.

Also, Texas does not allow licensed professionals to form a Limited Liability Company.

Professionals seeking limited liability to all partners should look to Professional Limited Liability Company.

Now, there are requirements to forming a limited liability company.

First, one or more organizers need to file Certificate of Formation with Secretary of States, which must state Limited Liability Company name, location of principal office, name and address of registered agent, and whether the company will be managed by member or manager.

2) Formation Requirements

The company agreement is any agreement, written or oral, of the members concerning the affairs or the conduct of the business of a limited liability company.

A company agreement of a Limited Liability Company having only one member is not unenforceable because only one person is a party to the company agreement.

Moreover, the agreement may expand or reduce duties, but it may not:

Unreasonably restrict right to information or access to records,

Unreasonably reduce duty of care,

Eliminate the duty of loyalty or obligations of good faith and fair dealing,

Vary the right to expel a member in an event specified by statute,

Vary requirement to wind up Limited Liability Company's business in case specified by statute,

Or restrict rights of a person, other than a member, or transferee of a member's distributional interest.

3) Financial Rights & Obligations of Members

Next, let me go over the Financial Rights and Obligations of Members.

There is an internal allocation of financial interests.

Here, profits are shared among members as provided by Certificate of Formation.

However, no distributions may be made if the Limited Liability Company would be insolvent after the distribution.

Regarding member contributions, except in dissolution or other specified events, the return of a member's capital contribution requires unanimous consent of all members.

In a Limited Liability Company, members or managers usually are not personally liable for company debts, and creditors are limited to Limited Liability Company resources for company debts.

4) Management

Management may be in members or they may elect managers, who will be agents of the Limited Liability Company.

If management is vested in the membership, individual members have apparent authority to bind the company contractually.

Managers and officers may be liable for acts or omissions which are criminal, made maliciously, in bad faith, or in conscious disregard of the Limited Liability Company's best interests.

Each manager and managing member owes the duties of loyalty and care to the Limited Liability Company and to the company's other members.

If members have the managing power, then they owe the same fiduciary duty to each other and to the company.

In cases of indemnification, when a person is sued in his capacity as an agent, either as a manager or a member, and incurs costs such as attorney fees, fines, a judgment or settlement, he can seek reimbursement from Limited Liability Company.

Whoever manages the company, either members or managers, are agents for the company and can ask for indemnification if he is liable for things he did as an agent.

When members fail to comply with organization formalities, they are treated as partners in a general partnership.

5) Dissolution & Winding Up

Dissolution can occur upon expiration of period of duration, events stated in Certificate occur, no more members, or when a court orders dissolution.

Dissolution procedure is similar to the ones in corporations. And winding up is a process that entails selling all the assets of a business entity, paying off creditors, distributing any remaining assets to the principals, and then dissolving the business.

A majority vote of all of the members of a limited liability company is needed to approve voluntary winding up, revocation, cancellation, or reinstatement, or, if the company has no members, a majority vote of all of the managers of the company is required.

Also, before the termination of the existence of a domestic entity takes effect, the domestic entity may revoke a voluntary decision to wind up the entity by approval of the revocation. The company may cancel an event requiring winding up specified in the certificate and continue its business only if the action is not prohibited by the entity's governing documents and is expressly authorized by the Business Organizations Code. Lastly, reinstatement is allowed, which is to reinstate a terminated Limited Liability Company before the process of winding up had been completed.

Professional Associations

1) Introduction

Members of a licensed profession, such as doctors and lawyers, cannot practice profession through a general business corporation, but they can form a professional service corporation.

2) Formation

In general, professional association is governed by rules of corporation.

The certificate must meet general corporation requirements except for use of professional association and must indicate

profession to be practiced and include names and addresses of original shareholders, directors, and officers.

There must also be certification that each shareholder, director, and officer is licensed to practice profession.

3) Operation

All shareholders in a professional association must be licensed professionals.

Many professional associations operate like a partnership, where decisions are made among the members.

4) Creditor Rights

Professionals are liable for their own malpractice and liable for contracts entered in professional association's name.

5) Dissolution

Dissolution can occur through either filing article of dissolution or by failing to comply with the rules.

If a shareholder dies or is disqualified from the practice, the professional association must purchase his stock to prevent passing by inheritance to a non professional.

Otherwise, the professional association certificate may be forfeited.

Consumer Rights.

Deceptive Trade Practices Act

1) General Rules

One: Deceptive Trade Practices Act is liberally construed in favor of consumers.

And two: This act may not be waived unless there is a waiver. To elaborate, when there is a waiver, as-is disclaims implied warranties, and negating reliance precludes all Deceptive Trade Practices Act claims.

2) Deceptive Trade Practices Act Remedies

Remedies provided by the act are in addition to any other procedures or remedies provided for in any other law, but a plaintiff cannot get a double recovery of damages.

The plaintiff, however, can get more than one recovery if recoveries are from separate acts or practices.

3) Definitions

One: Consumer is an individual, partnership, corporation, this state, a subdivision of this state, or an agency of this state, who seeks or acquires by purchase or by lease, any goods or services.

There is an exception for business consumer who has assets of 25 million dollars or more.

And two: A business consumer is an individual, partnership, or corporation who seeks or acquires, by purchase or by lease, any goods or services for commercial or business use.

Proper Plaintiff

1) Parties Covered by Deceptive Trade Practices Act

Individuals are covered by the Deceptive Trade Practices Act no matter what their financial status is. However, businesses are only covered by the act if assets are less than 25 million dollars.

2) Consumer

Consumer includes an individual or a proper entity who seeks, acquires, by purchase or by lease, any goods or services.

On seeking as a consumer, an entity does not need to actually buy the good, but an entity needs to possess subjective good faith intent to purchase the good. Here, no transfer of consideration is required.

And on acquiring, a consumer can acquire the goods from a purchase either because he personally bought the goods or is a third party beneficiary.

To elaborate, the consumer is a third party beneficiary if goods were bought primarily for his benefit.

Moreover, an incidental beneficiary, such as a borrower or passenger, is not a consumer.

On Exam: Look for words intended or incidental to distinguish between incidental and intended beneficiary.

Again, a consumer can seek or acquire any goods or services.

Goods include tangible chattels and real property purchased or leased for use, which includes for the purpose of resell.

Bust goods do not include money, stock, accounts receivable, CDs, or partnership interests.

On the other hand, services include work, labor, or service purchased or leased, and services furnished in connection with the sale or repair of goods.

But services do not include activity that is merely lending money.

For Example, if a consumer's objective is to purchase a tangible good with money borrowed from the bank, then the bank is subject to the Deceptive Trade Practices Act.

And again, a consumer can seek or acquire any goods or services by purchase or lease.

Here, purchase can mean any consideration.

Truly free goods or services are not covered by the Deceptive Trade Practices Act.

Also, purchase does not have to be money and can be a legal detriment

On the other hand, a lease means a transfer of right of possession for a period of time in exchange for consideration. Lastly, Business Consumers are those buying for business purposes.

Consumer includes business consumers, but it does not include business consumer that has assets of 25 million dollars or more, or that is controlled by an entity with assets of 25 million dollars or more.

A defendant has the burden to prove the affirmative defense that the plaintiff is a business consumer with gross assets of 25 million dollars or more.

Exemptions from DTPA

1) Media

Deceptive Trade Practices Act does not apply to owners or employees of regularly published newspaper, magazine, telephone directory, broadcast station or billboard.

However, it applies if the owners or employees of media either have knowledge of the false, deceptive or misleading acts or practices or had a direct or substantial financial interest in the unlawfully advertised good or service.

2) Professional Services

Generally, the Deceptive Trade Practices Act does not apply to professional services where the essence is in providing professional advice, judgment, or opinion.

This exemption protects attorney, doctor, architect, and engineer from their services and is service specific, not profession specific.

Attorneys, doctors, accountants, architects, and engineers provide professional services are exempt unless there is:

One: An express misrepresentation of material fact that cannot be characterized as advice, judgment or opinion.

Two: A failure to disclose information.

Three: An unconscionable action or course of action that cannot be characterized as advice, judgment or opinion.

Or four: Breach of an express warranty that cannot be characterized as advice, judgment or opinion.

3) Personal Injury Claims

Generally, there is no recovery for a cause of action for bodily injury or death, or the infliction of mental anguish.

However, a plaintiff can get economic damages in connection with bodily injury or death and mental anguish if he can prove knowledge or intent, and a plaintiff can get all damages arising under a tie-in statute, which is to bring a claim based on other statutes through the Deceptive Trade Practices Act.

4) Large Transactions

In written contracts, the Deceptive Trade Practices Act does not apply to a claim arising out of a written contract if:

The contract is for more than 100 thousand dollars

And the plaintiff is represented by an attorney at the time of the contract. This attorney must not be suggested by the defendant.

However, the Deceptive Trade Practices Act applies if the written contract involves the plaintiff's residence.

Also, the Deceptive Trade Practices Act generally does not apply to a claim arising from a transaction involving total consideration by Plaintiff of over \$500,000. It does not have to be a written contract.

However, same as the written contract, the act applies if it involves Plaintiff's residence.

Proper Defendant

1) Basic Requirements

One: The plaintiff does not have to be in privity with the defendant.

Two: Goods or services sought or acquired must form the basis of the complaint.

Three: The defendant has to have some connection with the transaction, and his deceptive conduct must occur in connection with the transaction.

And four: For remote consumers, the Deceptive Trade Practices Act does not reach upstream manufacturers and suppliers when their misrepresentations are not communicated to the consumer. In contrast, the act reaches the upstream manufacturers and suppliers if misrepresentation reached the consumer.

In summary, the plaintiff does not have to be the one who purchases, and the defendant does not have to be the one who furnishes the goods or services.

However, the defendant has to have some connection to the transaction.

2) Action Contrary to Public Policy

If the Deceptive Trade Practices Act action is contrary to public policy, it is unenforceable and void unless:

It is in writing and signed by the consumer.

Consumer is not in a significantly unequal bargaining position.

Consumer is represented by an attorney of his own choosing.

And the waiver is conspicuous.

Claims under DTPA

1) 4 Claims Brought under Deceptive Trade Practices Act

Laundry List Violations

Breach of Implied or Express Warranty

Unconscionable Act

And the Violation of Article 21.21

2) Laundry List Violations

It is the use or employment by any person of a false, misleading, or deceptive act or practice that is:

One: Specifically enumerated in the laundry list

And two: Relied on by a consumer to the consumer's detriment.

There is a need for reliance by a consumer to the consumer's detriment.

Also, no privity, knowledge or intent is required unless it is specifically enumerated as an element of the violation.

And there are three most common prohibited practices of the laundry list violation:

The first is general misrepresentation about goods and services.

The actor makes a representation of fact regarding goods or services that is inaccurate or false.

Statements which constitute mere opinion, vague generalization or puffing are not actionable.

For Example, it could be a car dealer's misrepresentation regarding a rebate or a doctor's misrepresentation regarding benefits of drugs.

The second most common prohibited practice of the laundry list violation is misrepresentation about legal rights.

Here, assertion of legal rights that do not exist is actionable, but a valid contract interpretation is not.

For Example, it could be a landlord's misrepresentation of the right to enter and take equipment.

And the third most common prohibited practice of the laundry list violation is failure to disclose, which has 4 elements:

Defendant knew information regarding the goods or services.

The information was not disclosed.

There was intent to induce the consumer to enter into the transaction.

And the consumer would not have entered into the transaction on the same terms had the information been disclosed.

3) Breach of Implied or Express Warranty

The general rules are that:

Any breach of warranty can be brought under the Deceptive Trade Practices Act.

And warranties are created under the UCC and common law.

However, the Deceptive Trade Practices Act does not establish or define any warranties: It is merely a vehicle through which a breach of warranty claim can be brought.

On the Exam, first establish an independent breach of warranty, attach it to the Deceptive Trade Practices Act, and then look to statute and state law to see if the warranty exists and whether it has been disclaimed or limited.

Disclaimers are not affected by the fact that a claim is brought under the act, and a person cannot maintain a claim under the act for breach of implied warranty against a remote manufacturer. Let's look at different warranties.

First, an implied warranty of suitability in commercial leaseholds is where the property is fit for its intended purposes. This warranty may be waived.

Second, an implied warranty of good and workmanlike performance in service contracts is where there is a warranty that the work will be performed as a reasonably competent person would perform it in a contract for repair or modification of tangible chattels. This type of warranty may not be waived.

Also, there is no implied warranty for professional services.

And third, in an implied warranty of good and workmanlike performance and habitability in the sale of home, habitability may not be waived, but good and workmanlike performance may be waived.

4) Unconscionable Act

The third type of claim is any unconscionable action or course of action by any person.

Unconscionable act is an act or practice which, to a consumer's detriment, takes unfair advantage of the lack of knowledge, ability, experience or capacity of the consumer to a grossly unfair degree.

The objective standard is used for unconscionable act.

On Exam: Review the conduct at the time of the contract and do not consider Defendant's mental state.

Furthermore, grossly unfair means that unfairness was noticeable, flagrant, complete and unmitigated.

5) Violation of Article 21.21

It is the use or employment by any person of an act or practice in violation of Insurance Code Chapter 541, Article 21.21.

Any violation of Article 21.21 is automatically a violation of the Deceptive Trade Practices Act.

This is not a tie-in statute.

The Deceptive Trade Practices Act directly states it is actionable.

Defenses & DTPA Remedies

1) Defenses

There are five Defenses to the cause of actions based on Deceptive Trade Practices Act:

The first defense is absence of reliance. If it is a laundry list or unconscionable act violation, Defendant can claim that there is no reliance by Plaintiff.

The second defense is lack of pre-suit notice.

The third defense is mediation and arbitration, where Deceptive Trade Practices Act claims are subject to mandatory mediation or arbitration clauses.

The fourth defense is the statute of limitations.

It is 2 years from the date of Deceptive Trade Practices Act violation or the date the plaintiff discovered or should have discovered the violation.

The statute of limitations begins to run from the time the plaintiff discovers or should have discovered the injury, not the violation.

And the fifth defense is the contractual limitation on damages clause.

The limitation clause can only be used to limit liability for breach of warranty, and it cannot be used to limit liability for a laundry list violation or unconscionable act.

2) Remedies

First, the producing cause is a substantial factor which brings about the injury and without which the injury would not have occurred.

On Exam: Never mention the proximate cause. The producing cause is a lower standard than the proximate cause.

The producing cause may be negated by stating the sale is "as is". This is not a waiver, meaning, the plaintiff may still sue, but his cause will be negated.

Second, damage is a remedy.

As the general rule, the consumer may recover economic damages under the Deceptive Trade Practices Act.

If the defendant knowingly committed the act, the consumer can get 3 times the amount of economic damages plus mental anguish damages.

And if the defendant intentionally committed the act, the consumer can get 3 times of both the amount of economic and mental anguish damages.

Let's go over the three types of damages: Actual, economic, and mental anguish damages.

One: Actual damages are available for actions brought through a tie-in statute. Actual damages include economic damages, mental anguish and pain and suffering.

3 times of the actual damages are available upon a showing of the intent, knowingly.

Two: Economic damages are compensatory damages for pecuniary loss, including costs of repair and replacement.

It does not include exemplary damages or soft damages.

Soft damages include physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, and loss of companionship and society.

And three: Mental anguish damages are available upon a showing of knowing conduct.

Here, knowing means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim.

Also, the standard for showing of knowing conduct is knew or should have known.

And lastly, the attorney's fees is another Deceptive Trade Practices Act remedy.

One: The Deceptive Trade Practices Act mandates the award of the attorney's fees to the prevailing consumers.

Two: The rationale behind awarding the attorney's fees is to fully compensate the consumer and encourage attorneys to represent consumers.

To deter frivolous lawsuits, the Deceptive Trade Practices Act mandates attorney's fees to a defendant when the suit was:

Groundless,

Brought in bad faith,

Or brought for the purpose of harassment, which must be the sole purpose.

Lastly, the award of attorney's fees is mandatory, and the amount is discretionary.

An attorney's percentage contingency fee is valid, but an attorney's fee award under the Deceptive Trade Practices Act must be in dollars based on the number of hours worked.

Pretrial Matters

1) Pre-Suit Notice

A person has to give a written notice at least 60 days before filing a Deceptive Trade Practices Act lawsuit unless he is filing a counterclaim.

In a counterclaim, actual notice is required, and constructive notice is not enough.

There must include 2 numbers in the notice:

One: The amount of damages sought.

And two: The amount of attorneys fees sought.

If the notice is not received, the defendant may file a plea in abatement no later than 30 days after filing the original answer to the consumer's complaint.

After filing the plea in abatement, the suit is abated for 60 days and if the plaintiff does not give notice within the 60 days, the suit is dismissed.

2) Settlement Offers

The defendant may offer to settle with an individual or a class, and it must include an offer to pay the following amounts of money, separately stated:

One: An amount of money or other consideration reduced to its cash value,

And two: An amount of money to compensate the consumer for the consumer's reasonable attorney's fees incurred as of the date of the offer.

If the consumer rejects the settlement offer, it may be filed with the court with an affidavit certifying its rejection.

Rejection of a reasonable settlement offer limits a consumer's recovery.

Furthermore, if the court finds that the settlement offer is the same, substantially the same, or more than the damages found by the trier of fact, the consumer will recover an amount not greater than the lesser of:

The amount in the settlement offer,

And the amount of damages found by the trier of fact.

Also, a reasonable settlement offer precludes treble damages.

3) Attorney's Fees

Rejection of a reasonable settlement offer limits a consumer's attorney's fees.

The offer of the attorney's fees only needs to be reasonable when made.

4) Discovery Rule

An action under the Deceptive Trade Practices Act must be commenced:

Within 2 years after the date on which the false, misleading, or deceptive act occurred,

Or within 2 years after the consumer discovered or, in the exercise of reasonable diligence, should have discovered the occurrence of the false, misleading or deceptive act.

Lastly, courts generally look to the date of injury to determine when the consumer should have known.

Wrongful Debt Collection

1) Federal Debt Collection Practices Act

Federal Debt Collection Practices Act applies to debt collectors who are collecting a consumer debt, and the second is Texas Debt Collection Practices Act, which applies to debt collectors who are collecting a consumer debt.

Let's look at these two acts separately, starting with the Federal Debt Collection Practices Act.

Again, the Federal Debt Collection Practices Act applies to debt collectors who are collecting a consumer debt.

On debt collectors, there are third party debt collectors, who are any persons who regularly collect debt for another. Third party debt collectors even include attorneys who regularly try to collect consumer debts on behalf of clients.

A creditor is also a debt collector if he collects his own debt using a name other than his own.

Also, consumer debts are different from business debts.

Consumer debts are debts obtained for personal, family or household use.

When deciding what type of debt it is, the relevant time is when the personal, family or household loan is made, not when the collection is attempted.

There are four prohibition rules on communication with the debtor:

One: Contact must be between 8 a.m. and 9 p.m.

Two: The consumer must be represented by an attorney. This means that the debt collector cannot communicate with the consumer unless his attorney consents.

Three: A debt collector can contact the consumer at work until he has knowledge that the employer objects.

And four: A debt collector cannot communicate with parties other than the consumer.

However, the debt collector can talk to third parties when he is trying to locate a consumer, as long as he does not say that he is collecting debt.

There are also prohibited conducts of debt collectors.

One: False or misleading representations, which misrepresents the character, amount or legal status of any debt.

Two: Threats or coercion.

Three: Harassment or abuse.

And four: Unfair or unconscionable conduct, which includes violence, obscenity, and repeat annoying phone calls.

Next, under the Federal Debt Collection Practices Act, a validation notice must be sent.

Debt collectors have to send a written notice to the debtor of the alleged debt, to whom it is owed and the amount owed, then give debtors 30 days to dispute the validity of all or part of the debt.

If the debtor disputes the debt, the collector must stop all collection efforts until he sends information verifying the debt. However, if the debtor does not dispute the debt, the collector may assume it is valid.

Even if the notice explains the rights of the debtor, it may still be invalid if it is overshadowed by accompanying or subsequent messages.

When evaluating whether the act has been violated by any communications from debt collectors, apply the eyes of the least sophisticated consumer.

Finally, the Federal Debt Collection Practices Act can be enforced through a private suit or administratively.

There is a 1 year Statutes of Limitations for a private suit.

If the actual damage is a class action, there is no minimum recovery and damages are capped.

Punitive damages are up to 1,000 dollars.

And as far as attorney's fees, the award of attorney fees to the plaintiff is mandatory if the plaintiff wins, but the amount of attorney fees is discretionary.

However, the defendant is entitled to fees if the plaintiff brought the suit in bad faith, and for purposes of harassment.

2) Texas Debt Collection Practices Act

Again, the Texas Debt Collection Practices Act applies to debt collectors who are collecting a consumer debt.

Consumers can sue under the theory of tort of wrongful debt collection or under this act.

It is a tie-in statute that a consumer can sue under the Deceptive Trade Practices Act.

There are some prohibited conducts under the Texas Debt Collection Practice Act. This is an exclusive list.

One: Threats or coercion, including threats of arrest or any act prohibited by law.

Two: Harassment or abuse, including profanity or annoying phone calls, causing consumer to incur long distance charges.

Three: Unfair or unconscionable conduct, including attempts to collect amounts not authorized.

And four: Fraudulent, deceptive or misleading representations.

On using independent debt collectors, the creditor has no liability unless he had knowledge that debt collector engaged in prohibited conduct.

Lastly, regarding the enforcement of the Texas Debt Collection Practices Act, the bona fide error defense is a defense to show a bona fide error and procedures designed to prevent that specific error.

In civil damages, damages and reasonable attorney fees are the same as under the Deceptive Trade Practices Act.

And civil damages are at least 100 dollars for each violation.

Tie-In Statutes

1) General Rule

Generally, a violation of the Tie-in Statute is a violation of the Deceptive Trade Practices Act.

2) Major Benefit

First, a Major Benefit of the tie-in statute is that consumers can get actual damages rather than just economic damages. Here, consumers can get up to 3 times actual damages if they can show that the defendant acted knowingly.

3) Types of Statutes

One: The Business Opportunity Act, which applies to the sellers who promise to sell a buyer goods or services to enable a buyer to start a business.

Two: Contest and Giveaway Act, which applies to contests and giveaways to induce a consumer to attend a sales presentation.

Three: Debt Collection Act.

Four: Health Spa Act, which gives a person 10 days to change his mind about a health spa contract.

Five: Home Solicitation Act, which covers door to door sales and give consumers 3 days to their change minds.

Six: Credit Service Organizations, which covers credit repair businesses.

Seven: Removal of unauthorized vehicles from parking facility, such as towing. It requires specific signs.

Eight: Rental Purchase Agreements. It is an agreement where people rent to own the subject matter in the agreement.

Nine: Representation as an attorney. It prohibits a notary from holding out as an attorney.

Ten: Manufactured Housing Standards Act.

Eleven: Motor Vehicle Commission Code, which is the lemon law for new cars.

Twelve: Timeshare Act, which give people 6 days to change their minds.

Thirteen: Unfair claims Settlement Practices Act.

And fourteen: Regulation of Telephone Solicitation.

Criminal Procedure

Short Answers

Different from other states, Criminal Procedure in Texas is a short-answer exam.

To elaborate, on the first day, a 90-minute Procedure and Evidence short-answer exam is given.

The answers must be limited to the 5 lines provided after each question, thus the governing law does not need to be stated.

A sample answer should be as succinct as the following: Court will find the Fourth Amendment improper search violation if there is state action, and the state lacked probable cause to act.

2) Governing Law

Texas criminal procedure law consists of the Federal and State Constitutions, Fourth, Fifth, and Sixth amendments as applied by the Fourteenth Amendment.

Search & Seizure: Fourth Amendment Violations

1) State Action

The Fourth Amendment protects persons, houses, and papers, and it affects only against governmental conduct.

On the other hand, it does not affect searches by private persons unless that person is acting as an agent of the police.

2) Seizure

A seizure exists when a reasonable person would not feel free to go.

In a case of seizure, the officer must have probable cause to believe that a crime is being or has been committed in order to make an arrest.

Some situations need arrest warrants while the others do not.

In a felony case, an arrest warrant is needed to arrest a defendant in his home and in a third party's home.

In a misdemeanor case, a police needs an arrest warrant to arrest anywhere unless the crime was committed in the officer's presence, was one of violence, or was one involving traffic offenses such as defendant driving under influence or driving while license suspended or revoked.

On the other hand, an arrest warrant is not needed if the arrest is in public or if there are exigent circumstances.

For Example, there is danger to life, getting a warrant will allow the suspect to escape, or getting a warrant will cause destruction of evidence.

Moving on, investigative detentions and terry stops may be made by an officer when he has reasonable and articulable suspicion that the criminal activity is afoot.

This means making a reasonable person feels that he is not free to go.

However, the officer may not hold a person for a prolonged period, and if he does, the evidence obtained is tainted.

Also, suspicion is needed for sobriety checks and pretextual stops.

3) Search

It is an intrusion into an area that a person has a reasonable expectation of privacy.

When searching, there is an expectation of privacy for homes and cars.

For homes, infrared is not allowed to peek into a defendant's home.

However, if the public could see, then even with enhancements, so can officers.

For Example, a person can look into a home through window, airplane, or other public places. Therefore, officers are allowed to look into a home through window, airplane, or other public places without a warrant.

If the defendant conducts illegal activities with the public, an officer can enter without revealing his identity.

As for cars, officers can follow the defendant's car with a bug, scrape off paint, and look in with no probable cause or warrant. Furthermore, an affidavit of an officer must establish probable cause to obtain a search warrant.

There could be confidential and citizen informants.

On Exam: For a confidential informant, look at the totality of the circumstances.

In contrast, citizen informants are automatically considered reliable.

Challenges must be based on material false statements intentionally or recklessly made. If the defendant proves the material false statements, then that information is removed to determine whether probable cause still exists.

To execute a search warrant, officers must knock and announce. Here, exigency or constructive announcements are both considered valid.

However, even with a warrant, officers can only search places where the suspected item might be found.

After returning from the search, officers must create a list of items seized.

Detention of persons on premises is appropriate, but no frisk is allowed unless it is a terry stop.

There are 9 exceptions to the warrant requirement.

Under the following circumstances, officers may search without obtaining warrant.

One: Search incident to arrest. It must be a lawful arrest, which is usually accompanied by probable cause or warrant.

Timing must be reasonably contemporaneous.

And the scope of search is limited to grab area.

Officers can do a protective sweep to determine if there are dangerous persons present.

For cars, grab area is the whole passenger compartment.

Regardless of where the defendant is, officers may open anything unlocked, including passenger's items that are unknown and do not belong to the defendant.

Two: Automobile exception.

If an officer has probable cause to believe there is contraband, he may search car and motor-home.

And officers can search trunks and locked containers when reasonable.

Three: Inventory search. When booking a lawfully arrested person, the police may conduct an inventory search of his belongings.

However, if a police has to impound a car, he will have to follow the regular procedures.

Four: Plain view exception.

If an officer is where he is legally entitled to be and discovers contraband where the items are immediately identifiable as contraband, and there is exigency, then the items may be seized

Items are immediately identifiable as contraband means that the contraband can be identified without moving them.

Also, there is exigency when the contraband could be moved if the officers leave to get the warrant.

Five: Stop and frisk exception.

An officer can stop and frisk suspect without warrant upon reasonable and articulable suspicion if the detention is not prolonged.

If officer reasonably believes that the suspect may be armed, then officer can pat that suspect's outer clothing,

And officer can also remove the item if, based on object's plain feel, he could have reasonably believed that the seized item is weapon or contraband.

Six: Consent. Consent must be given voluntarily and knowingly.

Consent may be revoked by the defendant or a third party who has actual or apparent authority.

If there are conflicting answers, then officers cannot search.

On the other hand, if search has already been done, then officers can use evidence against the one who consented.

Seven: Exigent circumstances.

Exigent circumstance is a situation where people are in imminent danger, evidence faces imminent destruction, or a suspect will escape.

Hot pursuit is when an officer is chasing a criminal. It is an exigent circumstance and officers can seize all that is in plain view.

Community caretaking recognizes that a person may encounter a police officer in situations involving not only emergency aid, but also involving routine checks on health and safety.

Example: When an officer sees a child behind door suspiciously.

A warrant is not needed if the evidence may disappear quickly, such as a fingernail scrape or blood to prove the driver is driving under influence.

Eight: Administrative searches.

Sometimes administrative searches are not performed by the officers but by other administrators on site.

The general rule is that if the search is not performed by an officer, the search must be reasonable and has to be a part of the routine procedure.

Examples: Regular public school or employee drug testing and border search.

Here, school kids have a lowered expectation of privacy.

And nine: Wiretapping and eavesdropping, where any one of the following element will allow information to be admitted without warrant through wiretapping:

When the conversation is a non-private public speech.

When there is consent by one party.

When there is an announcement by one party.

Or When there involves controlled substances.

4) Exclusionary Rule

Under the fruit of the poisonous tree rule, illegally obtained evidence and all evidence derived from the exploitation of that evidence must be excluded.

This is because the government may not profit from its own misconduct.

However, if the government can show that the evidence was obtained from an additional or different source, then it is admissible.

If the defendant acts independently, the causal chain is broken, and the evidence obtained after that is admissible.

For Example, if he confesses after illegal arrest spontaneously. And if the government can show that an officer would have discovered the evidence anyway, then it is admissible.

The exclusionary rule does not apply in a civil case, in a grand jury proceeding, or in a parole revocation hearing, and all evidence can be used to impeach the defendant if he takes the stand.

Testimony of live witnesses cannot be suppressed even if officers found out about the witness by acting unconstitutionally.

Also, there is a good faith exception, which applies to a defective warrant that looks valid on its face.

Evidence without a valid warrant can be admitted at trial if police officers acted in good faith reliance upon a defective search warrant.

Lastly, to have standing in challenging the admission of evidence based on exclusionary rule, the person has to be in one of the following situations:

One: The person owned or had a right to possess premises being searched.

Two: The place searched was in fact that person's home, including a hotel guest or overnight guest because they have a substantial connection to the premise.
And three: When there is seized drug or stolen property from the defendant, there is automatic standing.

Confessions

1) Fourth Amendment Taint

If a defendant was illegally detained or arrested and then confessed, the confession is then a fruit from the poisonous tree and is inadmissible unless the exclusionary rule exception applies.

2) Coerced

A confession that is actually coerced is not admissible for any purpose.

Sometimes there is a Fifth Amendment Miranda Violation.

The government may not use the product of a custodial interrogation unless the Defendant has been told his rights and has waived them knowingly, voluntarily, and intelligently.

Custody is a situation where coercion exists.

Interrogation is anything that is reasonably likely to elicit an incriminating response.

That means spontaneous statement is not interrogation and is thus admissible.

3) Fifth Amendment Miranda Violation

Miranda rights is that under custody, a person has right to remain silent, anything he says can be used against him, he has right to have of an attorney, and if he cannot afford an attorney, one will be appointed.

A person can waive his Miranda rights, but the waiver must be specific.

On Exam: For waiver, look at the totality of circumstances.

However, Miranda warning is not needed if there are overriding considerations of public safety.

If a defendant asks for an attorney unequivocally, the police are not allowed to interrogate on any offense.

If the defendant asserts his right to silence, police cannot question about the same offense and prosecutor cannot bring up silence if Miranda was given.

Confession obtained in violation may be used for the purpose of impeachment if Defendant takes stand. Also, confessions obtained after prior confession without Miranda is admissible.

Any evidence obtained as a result of illegally obtained confession may be used.

4) Sixth Amendment Right to Counsel Violation

One: If a Defendant has been formally charged and has been appointed an attorney, the police may not interrogate on the same offense. However, if the interrogation is about an unrelated offenses, then it is admissible with Miranda.

Two: Jail cell informants. If an undisclosed paid government official deliberately elicits statements, these statements may not be used.

In contrast, if the statements were made voluntarily and the officials just listened, then these statements may be used.

And three: Sixth Amendment Right to Counsel violation at post-complaint line up:

It is a Due Process violation if lineup is unnecessarily suggestive and there is a substantial likelihood of mis-identification.

Court may exclude the in court identification unless the witness has an independent source from which he remembers.

Pre-Trial and Trial Process

1) Bail Hearing

Bail may only be denied for capital defenses and may not be excessive.

Under federal law, bail can be denied to prevent violent crime, or interference with witnesses.

Texas court must consider:

The amount required to give reasonable assurance the accused will appear.

The safety of the victim and the community,

And the accused's ability to make bail such as his financial resources.

2) Gerstein Hearing

If the defendant is arrested without a warrant, he must be brought before a magistrate for a probable cause determination within 48 hours.

In Gerstein hearing, the defendant has no right to attorney, and hearsay is proper.

3) Texas Right to Expert Witness

Right to expert witness is based on Ake versus Oklahoma.

In Texas, due process entitles an indigent the defendant to the appointment of an expert to assist in the defendant's defense when the defendant makes a preliminary showing that the issue for which expert assistance is sought is likely to be a significant factor at trial.

4) Right to Counsel

The defendant has right to an attorney at all critical stages, such as during interrogation, preliminary hearings, arraignment, sentencing, guilty plea, and trial.

Waiver of counsel must be knowing and intelligent. And to claim an ineffective assistance of counsel, the defendant must prove that the attorney fell below an objective measure of reasonably effective assistance and that there is a reasonable probability that the outcome would have been different without counsel's errors.

5) Arraignment

Arraignment is the act of calling the defendant before Court to answer the charge made against him by indictment, information, or complaint.

As soon as the defendant enters a plea, he has right to attorney. However, the defendant must be held within 14 days of filing complaint, or speedy trial begins to run on the 14th day.

6) Speedy Trial

60 or 90 days after arraignment, the defendant must be brought to trial or dismissal.

If the defendant asks for a continuance, which usually will only be granted with reasonable grounds, then time will be added on.

7) Discovery

Under the Brady Rule, prosecution must disclose all material exculpatory evidence without request.

During discovery, the government cannot destroy evidence in bad faith, and the defendant must turn over all evidence that does not violate the Fifth Amendment, which include:

Non-testimonial evidence such as fingerprints and DNA.

Alibi witnesses with their names provided, because they would eventually come out.

And documents not written under coercion. If it is inculpatory to possess these documents, prosecution might not be able to reveal source.

8) Trial by Jury Section 16B

There must be a fair cross section of the community in the pool.

The actual jury after voir dire does not have to have a fair cross section of the community, just the pool.

Parties cannot use all preemptory challenges to discriminate against the jurors.

9) Juvenile Court

In juvenile courts, there are no right to jury.

Juvenile court is only available for the defendants under 18 at the time of trial.

If the defendant is 16 or 17 but commits a serious crime, then he can be tried as adult.

10) Guilty Pleas

Guilty pleas trigger the defendant's right to attorney.

It must be entered by the defendant voluntarily, knowingly, and intelligently. This means that the defendant must understand the charge, its consequences, and the rights he is giving up.

Also, guilty pleas must be on the record.
If a deal is violated by the prosecutor, the plea can be revoked or the deal is specifically enforced by Court.

11) Sentencing

Sentencing also triggers right to an attorney.
During the sentencing hearing, Court can use inadmissible evidence to make decisions.
Examples of Inadmissible Evidence: Juvenile offenses and hearsay.
In a vindictive sentence, the defendant is punished for exercising his appellate rights or other rights.
However, it is unconstitutional for court to do so.
Without actual vindictiveness, when there is an apprehension on the part of the defendant to exercise his legal rights due to fear of retaliation from Court, vindictiveness may be presumed.
If judge aggravates the sentence, he must put reasons in writing, the decision must be based on factors not considered in setting the range, and the decision can be appealed.

12) Double Jeopardy

This means that generally, the defendant cannot be tried for the same offense twice, with the following three exceptions.
One: Hung jury is where jury is unable to reach a verdict.
Two: Manifest necessity emergency.
For Example, the defendant is under a severe medical condition.
Three: Mistrial at the defendant's request, unless Plaintiff did something so bad as to force the defendant to request the mistrial.

And four: There is a re-trial after a successful appeal.
Double jeopardy attaches at jury trial when the jurors have sworn, or at bench trial when the first witness has sworn.
Same offense must have same elements: 2 crimes do not constitute the same offense if each crime requires proof of an additional element that the other does not.

13) Sworn Application

Sworn application for probation requires a statement that the defendant has not previously been convicted of a felony.

14) Joinder and Severance

Court can grant relief from prejudicial joinder of offenses or joinder of defendants by ordering separate trials, severance of the defendants, or any relief that justice requires.
Counts sever if the defendant shows prejudice.
For Example, if one defendant wants to take stand on one and not the other.
In contrast, counts join if 1 count is a part of same transaction or class of another count.
For Example, Court may permit joinder of fraud and antitrust counts even when the acts alleged are separate.

Defendants are severed if prejudice or the confession of co-defendant will be used as admission, and it implicates other. On the other hand, defendants will be joined if they are from the same transaction.

For Example, if 2 or more defendants may be charged in the same indictment when they are accused of participating in the same act or transaction, they may be joined.

Family Law

Marriage

1) Texas Marriage

In Texas, marriage is a voluntary civil contract between a woman and a man in which each party owes a fiduciary duty to the other. Texas favors marriage over co-habitation of unmarried couples but recognizes both ceremonial and common law marriages.

2) Ceremonial Marriage

There are three requirements to ceremonial marriage:

One: Marriage license. If parties do not get a license, marriage is still valid but it must be established by proof.

Two: Ceremony, where no particular form of ceremony is required. And three: Celebrant. A valid ceremonial marriage has to be conducted by a person with reasonable appearance of authority, and at least one party has to act in good faith.

On the other hand, premarital education courses and residency are not required.

Although encouraged, parties are not required to have a premarital education course offered by a health professional or religious counselor, and there are no residency requirements.

3) Void & Voidable Marriages

First, grounds for void marriages include bigamy and consanguinity.

Though bigamy makes a marriage void, a marriage becomes valid if impediment is removed.

Example: There is a divorce or a spouse dies.

Second, a marriage is void if it is between a party and the party's:

Parents or kids.

Brothers, sisters, or their kids.

Or uncles and aunts.

Nevertheless, a party can marry his first cousins, who are the kids of uncles or aunts.

To terminate a void marriage, a party has to file a suit to declare marriage void, and for a Texas court to have jurisdiction to terminate a void marriage, the marriage must either have been taken place in Texas or at least one party must be domiciled in Texas.

Furthermore, marriages can be annulled.

The grounds for the annulment of marriage include:

One: Under the age of 16

Two: One spouse concealed a divorce within 30 days of marriage

Three: Impotency

Four: Incompetency

Five: Fraud, duress, force

And six: Married within the 72 hour waiting period after the license was issued

To elaborate, if a party is under the age of 16, the marriage can be annulled.

This is because under age of 16 requires court order or a person who has court-ordered right to consent.

If a child marries with a written parental consent, application for a license must be made within 30 days after parental consent.

Now, if a parent sues to annul the marriage, they have 90 days from the date the discovered or should have discovered the marriage.

Once a suit is brought, it is in the court's discretion whether to annul the marriage, and Court must consider all relevant factors, such as pregnancy.

Next, if one spouse concealed a divorce within 30 days of marriage, the other spouse must file action to annul within 1 year.

Regarding fraud, duress, and force, the marriage can be annulled if a party married under the influence of alcohol or narcotics.

And sixth, if a couple got married within the 72 hour waiting period after the license was issued, it is a ground for annulment unless one party was in armed forces or 72 hour cooling off period is waived by the court.

If a couple was married within the 72 hour waiting period, annulment action must be filed within 30 days of the marriage.

However, if parties did not get a marriage license before getting married, the waiting period does not apply to them.

Cohabitation by the parties prevents a party from using grounds two to six to seek an annulment. These grounds include:

One spouse concealing a divorce within 30 days of marriage

Impotency

Incompetency

Fraud, duress, or force

And marriage within the 72 hour waiting period after the license was issued

4) Common Law

In general, there is a common law marriage if the parties cohabit and both parties hold each other out to the public as husband and wife.

The basic requirements include

One: The agreement to marry must be proven affirmatively and Two: cohabitation.

Regarding agreement to marry, it can also be proven by showing that the couple cohabited and held each other out to the public as a married couple.

Regarding cohabitation, there is no minimum time required.

Now, if an action to prove a common law marriage is not brought within 2 years after they stopped living together, there is a presumption that the parties did not agree to be married.

Lastly, parties can file a declaration to establish proof of a common law marriage.

This declaration has to contain the following elements:

One: The same information as a marriage license application.

Two: The parties are age 18 or older.

Three: Neither party is already married.

Four: The parties are not related within prohibited consanguinity.

And five: The same elements as a common law marriage.

Divorce

1) General Rules

First of all, divorce can be at-fault or no-fault.

Grounds for at-fault divorce include:

Cruel treatment.

Adultery.

Felony conviction.

Abandonment for more than 1 year.

Living apart for 3 years.

And being in a mental hospital for over 3 years.

In contrast, the ground for no-fault divorce is insupportability. The only defense to a no-fault divorce is if there is a reasonable expectation of reconciliation.

To file a divorce in Texas, one party needs to be domiciled in Texas for at least 6 months and 90 days county residence. Here, temporary absence over holidays does not affect requirements.

In filing a divorce, the county of residence of either party is subject to a 90-day residency requirement.

Family code venue rules are mandatory and cannot be changed by agreement.

Also, the petition for divorce can be short with no evidentiary facts. Allegations of evidentiary facts must be stricken on

motion of either party or on Court's own motion. It must state whether protective order for family violence is in effect. If there are minor children of the marriage, a Suit Affecting the Parent-Child Relationship must be joined in the divorce proceeding

There are different counseling orders Court can give the parties. One: Court may order the parties to submit to counseling to determine whether there is a reasonable expectation of reconciliation, and Court can order further counseling for an additional 60 days if Court continues to believe that there is a reasonable expectation of reconciliation.

Two: Court may order the parties to enter into mediation.

Meditated settlement is binding on the parties if it:

Provides in a separate paragraph that the agreement is not subject to revocation,

Is signed by both parties,

And is signed by the attorney if any were present at the time the parties signed the agreement.

And three: Court may also order that the parties attend a parent education and family stabilization course taught by a mental health professional or religious counselor.

In a collaborative law procedure, parties and their attorneys can agree in writing to use their best efforts and make a good faith attempt to resolve their dispute without court intervention except to have the court approve their settlement agreement.

Attorneys must agree that if the parties do not settle, the attorneys will withdraw from the case.

Also, a status report must be filed within 180 days after entering into the agreement and again at 1 year.

If parties have not settled within 2 years, Court can either set the case for trial or dismiss the case without prejudice.

2) Torts

In a divorce proceeding, the trial court should order a division of the estate of the parties in a manner that Court deems just and right, having due regard for the rights of each party and any children of the marriage.

Among other things, torts committed by either party are a factor in making the decision.

The two types of torts include intentional infliction of emotional distress and Fraud on the community.

First, divorce court can grant recovery for Intentional infliction of emotional distress. The conduct which was the basis of intentional tort cannot be considered in making a just and right division.

In other words, a party can only use the bad conduct once as the basis for his claim.

And second, there is no separate tort for fraud on the community. However, court can consider the fraud in making a just and right division.

3) Other Petitions When Filing for Divorce

These petitions include:

Temporary restraining order

Temporary injunction

Protective order

Temporary protective order

And petition for change of name

The first is a temporary restraining order.

Temporary restraining order is an ex parte decision that a judge can grant with no notice and hearing if a temporary restraining order is granted for unreasonable acts that no reasonable person could think he could commit.

Examples of Unreasonable Acts:

Concealing or transferring property during the divorce,

Vulgar phone calls,

Threats of bodily harm,

And etc.

The second petition is temporary injunction.

Temporary injunction is granted to protect a spouse who does not know the extent of the community estate.

It can be granted without notice and hearing if it is for an unreasonable act that no reasonable person could think he could commit

However, it requires notice and a hearing if it is for a reasonable act that a person ordinarily could do or refrain from doing unless it is ordered by Court.

Example of reasonable acts include:

Payment of temporary support from one spouse to another.

Awarding one spouse exclusive occupancy of house.

And restricting on spouse from accessing books and records of business.

The third petition is protective order.

A party can get a protective order on a showing that the other party has committed family or dating violence.

Dating violence can occur when there is a continuing intimate relationship between two parties without living together.

Violence in this context consists of intentional use of violence or threat of bodily harm.

A hearing should be given no sooner than 48 hours but no later than 20 days after the service of notice.

In the meantime, the claimant can get a temporary protective order, which prohibits the other party from committing family violence, communicating with family members, stalking other party, going near residence or place of employment, and etc.

The venue to petition should be the county where either the applicant or the respondent resides.

The maximum duration of a protective order is 2 years, but 1 year after the order is entered, the applicant can request a determination that there is not a need for the order anymore. Moreover, Court can order a respondent to complete a battering intervention and prevention program, counsel with a social worker, or perform acts that court determines are likely to reduce violence.

The fourth petition is temporary protective order, which, mentioned above, can be granted to the claimant who files a hearing for a protective order.

Generally, a temporary protective order is usually an ex parte decision, which means it is a decision that can be made by a judge without requiring all of the parties to be present.

A party can get it if Court finds a clear and present danger that a party is likely to commit family violence again.

A temporary protective order is valid for up to 20 days and upon motion, Court can extend for an additional 20 days.

A temporary protective order can also evict the other party from their home with the following procedure.

One: The claimant files a sworn affidavit giving a description of facts supporting the temporary protective order,

And two: The claimant appears in person to testify.

Lastly, the fifth petition is for change of name, which must be filed in district court and must contain the correct name, proposed name and reasons for the change.

Here, Court must find a good cause to grant change of name.

Paternity

1) Paternity Suit

The venue is the county where the child resides.

While jury trial is not available in a paternity suit, either party can challenge paternity even if the child was born during the marriage

A man is presumed to be the father of a child if any one of the following conditions is met.

One: A child was born during, or within 300 days after, marriage or attempted marriage. Attempted marriages include void and voidable marriages.

Two: The man married, or attempted to marry, the mother after the child's birth, and

Acknowledged paternity in a record filed with the Bureau of Vital Statistics,

Promised in a record to support the child,

Or was voluntarily named the father on child's birth certificate.

And three: During the first 2 years of the child's life, the man resided with the child and represented to others that the child was his.

A person can rebut the presumption of paternity with genetic testing or a written denial of paternity by the presumed father and written acknowledgement of paternity by another man.

For Example, if Winnie is living with Hubert, who is the man presumed to be the father because he is married to Winnie but having sex with another man Olive, then Olive has standing to rebut the presumption that it is Hubert's child. However, Olive must do so within 4 years after the child's birth and get a genetic testing.

Paternity can also be estopped.

Based on either party's conduct, Court can deny genetic testing and issue an order adjudicating the presumed father to be the father if:

The conduct of the mother or presumed father estops them from denying parentage,

And it would be against the child's best interest to disprove the father-child relationship.

It only applies to persons who were married at the time the child was born.

For paternity by estoppel, Court considers three things:

The length of time the presumed father assumed the role of father

The child's age and nature of relationship between the child and the presumed father.

And the harm that may result to the child if presumed paternity is disproved.

As mentioned above, a person can rebut the presumption of paternity with genetic testing.

Genetic tests must be taken by the alleged father and child.

If genetic testing is not available from the alleged father, for good cause and just circumstances, Court can order genetic testing by relatives of alleged father.

Example: His parents, siblings or kids.

However, if the alleged father refuses to submit to paternity testing, Court can hold him in contempt or enter a default judgment making him the father.

Also, Court must enter an order that the man is the father if genetic testing results establish that at least a 99% probability that the man is the father.

In contrast, Court must enter an order that the man is not the father if genetic testing results establish that the man is not the father or that another man is the father.

The only evidence that can rebut a genetic test finding that the man is or is not the father is if another genetic test has different results.

2) No Statute of Limitations

However, there is a presumption that retroactive child support for 4 years is reasonable and in the child's best interest. Here, presumption can be rebutted on a showing that the man knew or should have known that he was the father and sought to avoid paying child support.

Lastly, there is a temporary child support.

A party cannot be ordered to pay temporary child support just because a paternity suit has been filed. But a man can be ordered to pay temporary child support if genetic tests find that he is the father.

Adoption

1) Adopting Child

Generally, a child may be adopted if:

Both parents have died,

The parent-child relationship as to each living parent has been terminated,

In a second marriage situation, the stepparent wants to adopt the child,

Or the child is at least 2 years old and the parent-child relationship of one parent has been terminated.

2) Unmarried Minor Give Child for Adoption

Steps:

First, a petition for a suit to terminate the parent-child relationship must be filed.

It can be filed after the first trimester of pregnancy.

However, the hearing cannot be held until 5 days after the child's birth.

Second, the affidavit of status of child must be signed by the mother after the first trimester.

The purpose is to show that the mother is unmarried and provide information about the father to meet due process.

Before Court can terminate rights, the father needs notice either by:

Personal service if the father's whereabouts is known,

Or publication if the father's whereabouts is not known.

Third, the affidavit of relinquishment of parental rights must be signed by the mother even if the mother is underage, and it cannot be signed until 48 hours after child's birth.

And fourth, the affidavit of the waiver of interest in the child must be signed by the father, which waives any rights he may have.

If the alleged father decides to bring a paternity suit and establish that he is the father and wants custody, as soon as he

files his petition, Court can order him to pay temporary child support.

On the other hand, if the father refuses to sign, rights can be involuntarily terminated in three ways.

One: His right is automatically terminated if after being served, the father does not respond by either admitting paternity or filing a counterclaim for paternity.

By failing to file with the paternity registry within 30 days after the child's birth, or

By proof of culpable acts that are grounds for termination of the parent-child relationship.

3) Pre-Adoption Reports

Next, there are three pre-adoption reports that must be completed before an adoption can be finalized.

One: The pre-adoption home screening, which is a report by the social worker made after looking into the circumstances of home environment.

Two: The post-placement adoption report, which is a report by the social worker of the circumstances of the child in the home environment after placement.

Three: A criminal history report, which shows the adopting parent's criminal history.

And four: the social, health, education, and genetic history report, which is often referred to as SHEG.

SHEG is a report of the adopting parent's:

Social

Health

Education

Genetic history report

The SHEG must also include the history of abuse suffered by the child.

If the couple is married, both spouses have to sign the report.

4) Adoption Proceeding

During the process of an adoption, the change of circumstances can abate an adoption.

If a couple divorces, it abates the adoption proceeding.

However, if one spouse dies, it does not abate the adoption proceeding.

Also, during the residency period, the child must reside with the adopting parents for 6 months before adoption is final unless Court waives this requirement as being in the child's best interest

5) Older Child

If a child is 12 or over, he needs to provide a written consent to be adopted unless Court waives the consent requirement

There is a confidentiality requirement when a child becomes an adult, where he is only entitled to receive a summary of the

SHEG report, and the entire SHEG report can only be released if both parent and child are looking for each other.

Moreover, an adult can be adopted if he consents to be adopted.

6) Inheritance Rights

After the termination of the parent-child relationship, a child has the right to inherit from his parents unless the decree terminating the parent-child relationship expressly terminates inheritance rights.

7) Non-Relatives

Let's look at the standing of Non-relatives in adoption a child. First, foster parents have standing to file a petition to adopt if they have had possession of the child for at least 12 months, but they need the managing conservator's consent unless Court waives it due to the fact that the consent was withheld without good cause.

And second, other persons have standing if they have had possession of the child for 6 months, but they also need the managing conservator's consent unless Court waives it because consent was withheld without good cause.

8) Challenging Adoption

The validity of an adoption cannot be attacked more than 6 months after the adoption decree is entered.

9) Step-Parent/Second Marriage Adoption

Lastly, let's look at Step-Parent Adoption and Second Marriage Adoption.

If the other parent is still alive, a step-parent needs to terminate the other living parent's right first.

If the other living parent is willing to cooperate, then the step-parent can seek a voluntary termination proceeding and have the living parent sign an affidavit of relinquishment.

In contrast, if the living parent is not willing to cooperate, then the step-parent can seek an involuntary termination proceeding on grounds of:

Abandonment.

Abuse.

Neglect.

Imprisonment for over 2 years.

Culpable acts toward the child or another child.

Failure to pay child support for 1 year.

Or use of controlled substances.

Here, the statutory test is the best interest of the child.

The evidence must be clear and convincing evidence.

And even if these requirements are met, if the child is 12 or older, he must give consent to adoption unless Court waives it.

Custody-Managing Conservator

1) Appointment of Managing Conservator

First, the managing conservator is the person who is awarded with the custody of child, and the possessory conservator is the person who is awarded with the visitation of child.

Second, the requirements in determining custody include:

Considering the best interest of the child.

Not discriminating against a person based on gender or marital status.

And considering the evidence of past domestic violence and false report of child abuse.

Third, the factors in determining custody include:

Desires of the child.

Child's physical and emotional needs.

Parental abilities.

Stability of home environment.

Parent's plans and opportunities for the child.

And acts and omissions showing one parent is less fit than the other.

Fourth, the jury trial is available in custody cases.

Jury verdict is binding on Court and Court cannot enter a judgment notwithstanding the verdict.

Nevertheless, the judge can grant a motion for new trial on the custody issue if jury verdict is against the weight of the evidence.

Fifth, if a child is 12 or older, he can choose the managing conservator in the writing filed with Court unless Court finds that it is not in the child's best interest.

Also, a parent cannot be denied visitation unless danger to the child's physical or emotional health is shown.

Now, split custody can happen when some children over 12 choose to go with one parent but the other child is under 12.

Courts frown on split custody because they have a strong preference for keeping the family together. However, the paramount test is the best interest of the child and can always ask for a jury trial, which, again, is binding on Court.

2) Joint Managing Conservators

In a discretionary appointment, Court can order joint managing conservators if:

One: It finds that it is in the best interest of the child and rebuttable presumption also shows that joint managing conservators is in the best interest of child.

Two: The child's physical, psychological or emotional needs will benefit.

Three: The parents have shown ability to reach shared decisions.

Four: Both parents participated in child rearing before the suit was filed.

And five: Geographical proximity of party's homes is not a problem.

Court must appoint a parent the sole managing conservator or both parents joint managing conservators unless Court finds it would not be in the child's best interest because it would substantially impair the child's physical health or emotional development.

The issue here usually arises when grandparents or relatives are seeking to be appointed.

Also, appointment of joint managing conservators does not require equal or nearly equal periods of physical possession, and exclusive power to make certain decision can be given to one joint managing conservator.

Furthermore, Court order or party agreement to be joint managing conservators must:

One: Establish the child's residence or designate which joint managing conservator has exclusive right to determine the child's primary residence.

Two: Include provisions designed to minimize disruption of the child's schooling, daily routine and association with friends.

And three: Set out rights and duties to be exercised solely by one joint managing conservator and those to be exercise jointly.

In addition, one joint managing conservator can be ordered to pay child support.

3) Possessory Conservator

First, visitation order must be a Standard Possession Order unless parties agree otherwise. The visitation hours have to be specific, which means it cannot simply say reasonable visitation.

And second, if a parent lives within 100 miles of each other, possessory conservator gets possession.

The visitation period is:

6 to 8 P.M. every Thursday.

6 P.M. Friday to 6 P.M. Sunday on first, third, and fifth weekends.

And 30 days in the summer.

The possessory conservator must pay for travel expenses related to visitation if he has adequate resources to do so.

Child Support

1) Scope of Obligation

Court ordered child support must end at the later of age 18 or graduation from high school.

However, if the child is physically or mentally disabled before turning to the age of 18, action to enforce the order can be deferred until after he turns 18, as long as the child is disabled before he turns 18.

Support also terminates upon the following events:

The child enlisting in the military.

The child's marriage.

The obligor's parent's death, but Court can order support payments from deceased Obligor's estate.

And a parent terminating his parental rights.

Furthermore, Court must order the obligor to provide health insurance for the child.

Now, the payment of child support cannot be conditioned on getting visitation rights, and visitation rights cannot be conditioned on payment of child support.

In the jury trial, the jury cannot hear the issue of child support.

Additionally, child support and arrearages are not dischargeable in bankruptcy.

2) Amount

Statutory child support guideline is based on the monthly net resources of the obligor.

The amount is 20% of the obligor's net resources for one child, and an additional 5% from each additional child.

However, the amount can be increased or reduced by considering: One: The special needs of the child.

Example: If a child has severe asthma or allergies requiring regular medication that are beyond ordinary expenses.

Also, the adjustment is based on the ability of the parent to contribute to support.

Second, any financial resources available for the support of the child will be considered in the process of adjustment.

Third, the amount of possession and access to the child is also considered.

Court order must contain a written explanation justifying the departures from the guideline, and there are limits to this adjustment.

In addition, guidelines apply only to the first \$7,500 a month of net resources.

If the obligor parent's net resources exceed \$7,500 per month, Court may order additional support if it is shown that the needs of the child warrant a greater award.

Nevertheless, the obligor's parent's income and family lifestyle are not to be considered.

Net resource is the amount from all sources minus deductions for: Federal Insurance Contribution Act

Union dues

Health insurance for the obligor's children

And income tax withholding for a single person claiming one personal exemption and standardized deduction.

If the obligor's actual income is significantly lower because of unemployment or underemployment, guidelines apply to the obligor's earning potential.

Regarding payment, unless the parties agree otherwise, child support payments must be made to local child support registry or Attorney General.

To Enforce Child Support, there is:

Mandatory withholding from wages

Suspension of license

Child support lien for arrearages

Levy and execution of the obligor's financial assets

Contempt

And money judgment

The first is mandatory withholding from wages.

All final orders for child support must provide for mandatory withholding, but it does not apply to temporary support orders. The maximum amount subject to mandatory withholding is 50% of disposable earnings, such as take home pay. However, this will never be the case unless arrearages are involved.

Now, the mandatory withholding applies only to earned income, such as work pay, and not to investment income.

If the obligor spouse is self-employed, then he can be ordered to post bond or other security.

Second, Court can issue an order suspending license if the obligor is 90 days in arrears.

This rule applies to just about any type of license, including license to practice profession.

Before suspension, the obligor must be given 60 days notice.

After proper notice, license is then suspended if the obligor does not either pay all arrearages or enter into a reasonable repayment schedule.

However, licenses can be restored once the obligor pays off all arrearages.

Third, regarding child support lien for arrearages, lien can be put on the obligor's real property other than homestead and nonexempt personal property.

Lien also is put on claims for torts against others if the claim arose after lien attached.

A party has to file child support lien in the county where the obligor resides or has property.

Also, under the second spouse rule, if the obligor remarries, his spouse can petition to release from the lien any community property of the spouse and the obligor if it results in unreasonable hardship to family.

Fourth, if judgment for arrearages has been rendered, court can deliver a notice of levy to financial institutions holding assets owned by the obligor.

This freezes assets and the obligor has 10 days to:

Pay in full,

Enter into a repayment schedule,

Or file suit to contest the levy.

A financial institution must pay the amount in the notice no sooner than 15 days and no later than 21 days after delivery of the notice unless the obligor contests the levy.

Fifth, the obligor can be held in contempt for up to 6 months, \$500 in fine, or both, and the obligor can then also be placed on probation for 5 years.

However, if obligation to pay child support is contained in a settlement agreement between the parties, the obligor cannot be held in contempt unless agreement was incorporated into the divorce decree.

And sixth, on money judgment, if the obligor falls into arrears, Court can reduce the arrearages to judgment and interest at 6%. Also, there is no statute of limitations.

3) Enforcement

Texas court can only enforce a Texas order by contempt.

If a party wants to enforce another state's child support order in Texas, he needs to make it a Texas order under the Uniform Interstate Family Support Act.

4) Interstate Enforcement of Orders

To register an order under Uniform Interstate Family Support Act, a person must:

Send 2 copies of the support order to a Texas court.

Attach a sworn statement by his spouse showing the name and address of the obligor spouse and, if known, the name and address of the employer

Once registered, it becomes a Texas order and then can be enforced by contempt. Also, any future violations can be enforced.

However, contempt is not available for arrearages accumulated out of state.

If the obligor has arrearages out of state, Court can reduce the arrearages to a money judgment which is then entitled to Full faith and Credit in Texas.

Lastly, if the obligor has an out of state income-withholding order but he is working in Texas, he can mail a copy of the income-withholding order to the obligor's employer.

Under the Uniform Interstate Family Support Act, mailing a copy automatically triggers income-withholding unless the obligor contests the validity of the order.

If a party does not know the name and address of the employer, he can mail a copy of the support order and income-withholding order to Texas Attorney General's Child Support Enforcement Division.

Enforcement of Custody Order

1) General Rule

As a General Rule, if there is a question where a parent is withholding possession of a child in violation of custody order, disregard the theories available, a party must discuss habeas corpus.

Habeas corpus is a writ or court order that commands an individual who has restrained another to produce the prisoner at a designated time and place so that Court can determine the legality of custody.

During the habeas corpus procedure, Court only inquires as to whether there is a valid court order awarding custody and not as to whether it is an out of state order.

If there is a valid court order, there is a writ of habeas corpus issue.

However, temporary order can be issued if Court finds that there is a serious immediate question concerning the child's welfare. If the child has not been in a realtor's possession at any time within the past 6 months, Court may consider a motion or cross-action to modify custody.

The venue of habeas corpus is either in the county where the child is found or where the court of continuing jurisdiction is under the Suit Affecting the Parent-Child Relationship.

The tort of interference with child custody is available against:

The noncustodial parent who kidnaps the child,

The custodial parent who withholds the child in violation of visitation rights,

And the third party who aids and abets.

A party must give notice by registered or certified mail of the intent to file a tort suit in 30 days unless custody order is complied with.

On Exam: This remedy should always be discussed in an all Texas setting.

2) Uniform Child Custody Jurisdiction & Enforcement Act

First, jurisdiction to enter a custody order lies in the following descending order:

One: In the state with home state jurisdiction where the child has lived for the last 6 months.

Two: In the state with temporary emergency jurisdiction, which usually happens when the child has been abandoned or abused.

And three: If none of the above is available, in the state where the child and one parent have a significant connection to and where substantial evidence is available.

Even if one of the above tests is met, Court may decline jurisdiction if it is an inconvenient forum taking into account location and financial circumstances.

Once the custody order is entered, the issuing court has continuing exclusive jurisdiction as long as at least one party continues to reside in that state.

Remedies under the Uniform Child Custody Jurisdiction and Enforcement Act include:

One: Registration of order, where the petitioner can register 2 copies of the order with a Texas court and then go for any relief including contempt.

Two: Expedient enforcement, where Court can order the obligor to appear in court on the next judicial day after service of the order, and the child is then returned to petitioner unless custody or visitation order is vacated.

And three: Warrant to take immediate possession of child. Here, after filing to get possession or visitation of child, the petitioner can get a warrant to pick up the child if the child is likely to suffer serious physical harm or be removed from the state.

3) Modification of Child Support

To modify Child Support, a party who wants to modify child support needs to file a Motion to Modify Support Order.

This motion can be filed in the court where the order was originally issued. It is usually the Suit Affecting the Parent-Child Relationship court, because it has continuing exclusive jurisdiction.

Grounds for modifying include:

Circumstances of a child or an affected party have materially and substantially changed,

Or 3 years have elapsed and support deviates from guidelines by the greater of 20% or \$100.

Regarding the circumstances of a child or affected party that have materially and substantially changes, support can get a decrease if:

One: The obligor is called to active duty for at least 30 days, and it results in decreased net resources.

Or two: The obligor has a new child by second wife. Court considers all children to whom obligor owes a duty to support.

On the other hand, if one party wants to modify the custody arrangement, he needs to file a Motion to Modify Managing or Possessory Conservator.

This motion can be filed in court that originally issued the order. Again, it is usually the Suit Affecting the Parent-Child Relationship court.

The test to modify is that the modification is in the child's best interest.

4) Modification of Custody Order

Generally, custody order can be modified when circumstances of child or affected party have materially and substantially changed, and that if the motion to modify is filed within 1 year from the order to be modified, the party must also show danger to the child's physical or emotional health, unless the other party consents to the modification.

However, there is an exception: If the managing conservator voluntarily relinquishes possession and control for at least 6 months, the petitioner only has to show that the modification is in the child's best interest.

If a child has moved to a new county, the petitioner can file a motion to transfer to a new county. Now, a transfer is mandatory if the child has resided in the new county for at least 6 months. Ruling by a judge to transfer or not transfer is an interlocutory order and thus cannot be appealed. However, a party can file a writ of mandamus.

Each conservator must give the other party notice of intent to move at least 60 days before the move, and each conservator has 30 days to notify the other conservator who is living with or intends to marry a sex offender.

5) Multi-State Issues

In proceedings to modify custody or child support where the child has been moved out of state with one conservator, the relevant law is the Uniform Child Custody Jurisdiction and Enforcement Act and the Uniform Interstate Family Support Act. The petitioner should file a motion in the court that issued the custody order because it has continuing exclusive jurisdiction as long as one party still resides in Texas.

Now, if the conservator wants to transfer the proceeding out of the state, he must persuade a Texas court that Texas is an inconvenient forum because:

Neither the child nor the managing conservator have a significant connection with Texas,

And substantial evidence relating to the matter is no longer available in Texas.

If the other conservator has moved to a new county in Texas, on motion, Court must transfer the proceeding to the new county. Lastly, if all parties have moved out of state where child support order was issued, the motion to modify child support must be filed in the state where the obligor resides after

registering the support order in that state under Uniform Interstate Family Support Act procedures.

Other Family Law Principles

1) Grandparent's Rights

Grandparents who want visitation can file a petition for reasonable access for grandparent.

For a grandparent to be granted reasonable access, the parental rights of at least one parent must not have been terminated, and there must be one of the following grounds:

The child's parent are divorced or have lived apart for at least 3 months.

The child lived with grandparent for at least 6 months in the past 2 years.

Parent who is the petitioning grandparent's child is dead, had his parental rights terminated, is in prison, or is incapacitated.

Or the child has been abused or neglected.

However, if the child has been adopted by a new family, grandparents cannot petition.

2) Removal of Incapacity of Minor

Legal incapacity of a minor may be granted under special circumstances.

If the minor is 16 years old, legal incapacity of minority can be removed if the child is financially independent and living apart from parents.

And if the minor is 17 years old, legal incapacity of minority can be removed if it is in the child's best interest.

3) Child or Sexual Abuse

The Texas Department of Family and Protective Services can take possession of a child without a court order if:

It has information that would lead a person of ordinary prudence and caution to believe that the child was a victim of child or sexual abuse,

And if there is no time to get a temporary restraining order.

The department must file a Suit Affecting the Parent-Child Relationship and obtain an ex parte hearing within 3 working days after the child is taken into possession.

Parents must be given a written notice prior to the ex parte hearing of:

Why the child was taken away,

And a summary of the parent's legal rights.

Full adversary hearing must be held within 14 days. If the ex part or adversary hearing are not held timely, the child must be returned to parents.

And to keep the child, the department must show that:

There is a continuing danger to the child's physical health or safety caused by a parent,
And there is a reasonable likelihood that the child will be a victim of abuse in the future.
Professionals, such as doctors and attorneys, must report suspected child abuse within 48 hours.
This duty to report cannot be delegated, while failure to report is a misdemeanor.
The identity of a report is confidential and can only be disclosed to the police conducting an investigation.
And if it was reported in good faith, professionals are immune from the suit.

4) Liability for Child's Torts

Lastly, a parent is liable for property damage caused by the child's negligent conduct if the conduct is attributable to the parent's negligent failure to exercise duty of control and reasonable discipline of the child.
Here, there is no money limit, and theft parental liability for theft by the child under age 18 is \$5,000, whereas for intentional torts, parental liability for property damage caused by willful and malicious conduct of the child age 10-18 is \$25,000 per act plus court costs and attorney fees.

Community Property

1) Basic Principle

The Basic Principle of community property are:

One: Community property issues may be discussed every time family law or marriage is involved.

Two: Texas is a community property state.

Three: Community property is properties acquired other than separate properties.

And four: There is a presumption that property acquired during the marriage is community property.

2) Separate Property

The following properties are presumed to be separate property.

One: The property owned by either spouse before marriage.

Two: The property acquired during marriage by gift, will, or inheritance. Here, joint gift is a 50/50 separate property.

Three: Separate property as the result of a written partition or exchange of community property.

Four: Property purchased with separate property.

And five: Tort recovery for personal injury, which includes disfigurement, pain and suffering, and loss of consortium, but excludes lost wages, medical expenses, and loss of earning capacity.

3) Community Property

Generally, property, other than separate property, acquired during the marriage is presumed to be community property. Now, income is community property unless:
Both spouses agree in writing that the income will be one of the spouse's separate property.
It is a gift from one spouse to the other spouse. Here, income from gift is also presumed to be separate property.
And if community property is partitioned into separate property, then the income from each partitioned share is that spouse's separate property. However, income is that spouse's sole management community property.

4) Community Presumption
All assets acquired during marriage are presumed community property, as well as all assets and debts acquired on credit during marriage and all assets in possession at the time of the divorce, creditor's claim, or death.
If a party wanted to rebut, the burden of proving that it is separate property is on the party claiming it is separate property.
Lastly, the standard is clear and convincing evidence.

Characterization Issues

1) Inception of Title

Generally, the character of an asset is determined at the time the asset is acquired, not when the payments or property is received.
Subsequent expenditures do not affect the characterization but provide a basis for the claim for economic contribution or the right of reimbursement.
However, inception of title rule does not apply for pensions.
Example 1: Prior to getting married, Husband buys a life insurance policy with his separate property.
After he gets married, payments on the policy are made with the community property.
In this case, proceeds from the insurance policy are the decedent's separate property because the first premium was paid with separate funds.
Then, the later premiums paid with community funds would merely create a potential right of reimbursement.
Example 2: Bonus earned by the Wife before marriage is her separate property even though it is paid during marriage.
If one spouse incepts the title to property under adverse possession because he entered under a rightful claim, it is separate property of the adverse possessor.
Here, rightful claim means there was a mistake in the deed.

On the other hand, if one spouse gets the title by squatting, he is considered a naked trespasser, and the property is considered community property.

Now, in the inception of title in life insurance policies, the first premium payment determines whether the life insurance policy is separate property or community property.

Nevertheless, if insurance is community property, but the beneficiary is someone other than the surviving spouse, then it is a gift of community property and the surviving spouse may have a claim for fraud on the spouse.

And if the insurance is a separate property, but the community property was used to make other premium payments, then the surviving spouse has a claim for reimbursement.

2) Economic Contribution

Sometimes the community has claim for Economic Contribution.

Economic contribution can be claimed by the community:

When community funds are used to reduce secured debt or make capital improvements on one spouse's separate property, the community has a claim for economic contribution.

Or when separate funds are used to reduce or make improvements on community property real estate or the other spouse's separate property can also have a claim for economic contribution.

A claim for economic contribution is a community asset.

If a claim arises because of a divorce, it is subject to a just and right division, and if a claim arises because of a death, the surviving spouse gets half of the claim and the other half goes to the deceased spouse's estate.

However, economic contribution does not apply to interest, insurance, maintenance, repair, taxes, or time, toil, or talent. It only applies to principal payments on secured debt and capital improvements.

3) Reimbursement

Reimbursement is allowed when community property is used to pay for a separate debt not involving reduction of secured debt or capital improvements.

Generally, separate property used to pay community debt may also be entitled to reimbursement.

However, there is no reimbursement for:

Payment of child support, alimony, or maintenance.

Family living expense of spouse or child of spouse.

Contributions of nominal value.

Or student loan owed by spouse.

4) Property from Another State

In common law states, wages are separate property and how title is held determines its ownership.

If the property brought from another state was a separate property in that common law state, then it will be a separate property in Texas.

Next, quasi-community property. The division of quasi-community property is only allowed at divorce but not at death.

Quasi-community property is the property acquired in another state, which would have been characterized as community property in Texas had it been acquired while the parties domiciled in TX. Quasi-community property is treated as community property and is subject to a just and right division.

However, ownership and transfer of land located in another state is governed by the laws of that state under the situs rule.

5) Community Credit Presumption

As a general rule, credit received during marriage is community property. It does not matter whether one spouse or both spouses receive the credit.

In rebutting this presumption, loan is separate property if the lender agrees to look solely to the borrower's separate property to recover the funds borrowed, or if the loan is a non-recourse note secured by separate property.

6) Effect of Name on Title

Generally, the name on a title does not determine whether it is separate property or community property.

There are two exceptions, where separate property is presumed. One: Spousal gift presumption.

If one spouse uses separate property to buy property and then puts title in the other spouse's name, then there is a rebuttable presumption of gift to the other spouse making it his separate property.

In this case, if one spouse had used community property to buy the property, then it is presumed community property but only slight evidence is needed to show it was a gift.

And two: If a title document states that the property is the separate property of one spouse and the other spouse participated in the transaction, there is an irrebuttable presumption that the property is the separate property of the title holder:

To participate, the other spouse needs to see the document and not object. No parole evidence is allowed to contradict

7) Employee Retirement Benefits

Generally, pension benefits earned during marriage are community property even though they are not paid until after divorce. It does not matter whether they are vested or unvested.

A divorce decree dividing pension benefits can take one of two forms:

One: The decree specifies when to receive each pension benefit.

Or two: The decree cashes non-employee spouse out by awarding him other assets of equal value, leaving the entire pension plan with employee spouse.

If a nonemployee spouse dies before an employee spouse, his interest terminates and cannot pass under will or intestacy. On the other hand, if the nonemployee spouse outlives employee spouse, pension benefits go to the surviving spouse and the employee spouse's minor children.

The Qualified Domestic Relations Order is used to provide direction to the employee spouse's employer. Here, the employer can pay benefits directly to the non-employee spouse.

Now, the employee and employer can both make defined contributions to the plan.

The separate property is the account balance at the date of their marriage, and the community property is all the rest, remaining balance.

There is also the defined benefit plan, which has the freeze value of benefits as of the date of divorce. Any post-divorce increases in value are separate property.

As for military retirement benefits, under the Uniform Services Former Spouse Protection Act, all retirement benefits are community property.

However, the other spouse cannot get military disability benefits.

The character of disability benefits is determined when the loss of earning capacity occurred, not when the benefits are paid.

Next, Business Interest is different between corporations and partnerships.

In corporations, if a business is owned before marriage, which is separate property but increases in value during marriage, the community may have a claim for reimbursement for:

The value of time and talent expended.

The value of time reasonably necessary to preserve the separate property.

And the compensation received by the separate property owner.

Differently, partnership interest is either separate property or community property depending on when it is acquired. All distributions to a partner during marriage are community property.

The last part is the Commingling of Bank Accounts, where there is a community presumption.

When a bank account is so commingled that cannot be told which is which, the community presumption applies.

And when separate property and community property are commingled, it is presumed that community property is withdrawn first.

Division of Property upon Divorce

1) Just & Right Division

Upon divorce, community property, quasi-community property, and community debts are to be divided in a just and right manner by the trial court

While Court cannot divest separate property of one spouse and give it to the other spouse, Court can set aside separate property for the support of minor children.

Now, the division of property by a jury is merely advisory and not binding. However, a jury's findings on the value of community property are binding.

Though a final property division decree may not be modified, an ambiguous decree may be clarified.

Upon divorce, if court awards CP to one spouse and then the couple remarry, the awarded CP then becomes SP of that spouse. Couples are divorced as of the date trial court completes the divorce, and property acquired after that date is separate property, even if the property division has been appealed.

That brings us to appeal.

In determining whether a division was just and right, an appeal court will consider:

One: Age and physical condition of the parties.

Two: Relative ability and earning power of the parties.

Three: Relative need for future support.

Four: Size of the estate.

Five: Benefits the spouse would have received from the continuation of the marriage.

And six: The fault in breaking up the marriage. In no-fault divorce, it is not clear whether Court can consider fault.

Only trial court has the power to make a just and right division. Appellate courts can only find that the division was an abuse of discretion and remand.

Later discovered community property which was not divided at divorce is subject to a just and right division.

Here, action to divide the property must be brought within 2 years after the other party claims it is not community property.

2) Characterization Errors

Sometimes there are Characterization Errors, also known as Mischaracterization.

When a court mischaracterizes separate property as community property, it is automatically reversible error if, Court divides the separate property or awards separate property to the non-owner spouse.

However, it is not automatic reversible error if the separate property is mischaracterized as community property but is still awarded to the owner.

3) Limited Spousal Maintenance

To be eligible for the limited spousal maintenance, one of the following conditions must exist.

One: Marriage has lasted 10 years.

Two: Payor Spouse has been convicted of family violence within the past 2 years or while the suit is pending.

Three: Spouse lacks sufficient property to provide for his minimum needs.

Or four: The spouse either: Is unable to support himself because of a disability, is a custodian of a disabled child, or lacks employment skills adequate to provide for the spouse's minimal reasonable needs.

The maximum award is the lesser of \$2,500 per month or 20% of the spouse's monthly average income.

Also, limited spousal maintenance cannot continue for more than 3 years unless the recipient is disabled.

The factors to consider for the award are:

Lack of employment skills.

Physical and mental condition.

Contributions as a homemaker.

Contributions to the other spouse's earning ability.

And the other spouse's ability to meet their personal needs and child support obligation.

The award can be modified downward upon a showing that the circumstances of either party have materially and substantially changed.

The award terminates on the death of either party or if the receiving spouse gets remarried or cohabits with another person.

4) No Alimony

Moving on, there is generally no alimony, with 3 exceptions.

Alimony is awarded for:

One: Temporary support, which are support payments until a final decree is entered.

Two: Contractual alimony, where a spouse can agree to pay contractual alimony.

And three: In rem periodic payments. It must relate to property not easily divided.

5) Life Insurance Policy & Pension Plans

A divorce terminates the former spouse's rights as a beneficiary under a life insurance policy or employee pension plan, with also 3 exceptions.

A divorce does not terminate the former spouse's rights if:

One: The decedent renames his former spouse as a beneficiary after the divorce,

Two: The divorce decree names spouse as the beneficiary,
Or three: It is a qualified pension plan governed by the Employee Retirement Income Security Act. Under this act, federal preemption overrides the state divorce rule and the former spouse takes as beneficiary.

Proceeds of casualty, liability, or health insurance, not dealt with in a divorce proceeding, are payable to the spouse awarded the property even if insurance policy names other spouse as beneficiary.

6) Goodwill & Professional Education

First, professional goodwill is not community property unless it is a professional corporation. Commercial goodwill is community property.

Second, even if a professional education is acquired during marriage, it is not community property. The other spouse is not entitled to reimbursement or economic contribution.

And lastly, a person who marries another but is unaware that they were already married is a putative spouse.

This relationship is characterized as a partnership or joint venture, and the putative spouse is treated as if he is validly married, so rules about community property apply.

In a case of bigamy, where a person knows the other spouse was married, it is a meretricious relationship and he is not a putative spouse.

However, once the other spouse dies or divorces, the marriage becomes legal and community property law takes effect from this date.

Income from Separate Property

1) General Rule

Generally, income from separate property is community property, with 2 exceptions:

One: If one spouse makes a gift to another, the income from gifted property is presumed to be the donee spouse's separate property.

And two: If spouses divide community property, the income from each spouse's separate property share is that spouse's separate property.

2) Types of Income

5 common types of income:

Trust income interests

Corporate distributions

Stock options

Mutual funds

And increase from animals

First, income from trust is usually separate property.

However, if the beneficiary has unrestricted power to withdraw the principal from the trust at a certain time and does not do so, all income after that time passes is community property. Second, when a spouse's stock is separate property, all corporate distributions are separate property except for cash dividends. These distributions include stock dividend, stock split, capital gain, and etc. Third, if stock options are received during marriage, they are community property even though they are not exercisable until after divorce. Fourth, a regular dividend mutual fund is community property while capital gained dividend stock options is separate property. And fifth, the increase of progeny animals is community property.

Agreements Altering the Characteristics of Assets

1) Premarital Agreement

The first part is Premarital Agreement under the Uniform Premarital Agreement Act.

A premarital agreement is required to be signed by both parties and in writing.

While consideration is not required, amendments or revocation must be in writing.

Parties can agree that income from separate property will be separate property. This means if parties agree in advance that separate property is separate property, the future income from the separate property will be separate property.

Parties can agree to anything besides agreeing to:

Limit either's spouse's child support obligation,

Or that after they marry, one's spouse's separate property will be community property.

Defenses to a premarital agreement include if the agreement is not signed voluntarily or a party is unconscionable at time of signing:

Here, the unconscionability issue is a matter of law to be decided by the judge. Unconscionable also includes the other party's lack of disclosure of property when the right to disclosure is not waived.

The burden to prove this is on the spouse trying to set aside the premarital agreement.

2) Marital Agreements

Marital Agreements can also alter characteristics of assets.

In a marital agreement, spouses can agree in writing, which is signed by both spouses, to convert separate property to community property.

These agreements are valid against preexisting unsecured creditors unless the parties intended to defraud creditors.

However, marital agreements are not valid against subsequent creditors or bona fide purchasers unless creditors have actual notice. If the agreement concerns land, it must be recorded in county where land is located.

Defenses are the same with premarital agreements, which include the agreement being signed involuntarily or a party being unconscionable at time of signing.

In community property survivorship agreements, spouses can agree in writing that all or part of their community property becomes the property of the surviving spouse on death of other spouse. Community property survivorship agreements must be in writing and signed by both spouses.

This agreement does not need a court order to be valid, and either spouse can revoke by written notice to the other spouse.

In cases involving third parties, if a bona fide purchaser has no notice of the agreement and buys survivorship property from an executor, he takes good title against the surviving spouse. And if a bona fide purchaser buys from the surviving spouse but is not aware that the agreement had been revoked, he can take good title against the dead spouse's successor if the sale was more than 6 months after the decedent's death.

Lastly, there are also palimony agreements, which are agreements between cohabitants.

They must be in writing and signed by the party sought to be charged to be enforceable.

Power to Challenge Gifts of Community Property

1) Fraud on Spouse's Community Share

A person can make reasonable gifts of community property as long as gifts are not fraud on his spouse's community rights.

The factors of fraud on the spouse's community share include:

One: Relationship between the donor and donee. A gift to an unrelated party is presumed fraudulent.

Two: Special circumstances.

Three: Proportion of gift to all of the community estate.

And four: Whether the spouse is adequately provided for out of the remaining community estate. In other words, whether the gift was of the donor's sole management community property.

If one spouse makes an unreasonable gift of community property, the other spouse can disclaim the gift and get half of it back if his spouse is dead or get 100% of it back if his spouse is alive.

Regarding a life insurance policy, a life insurance beneficiary designation is considered a gift to the beneficiary at the time of the designation.

In determining reasonableness, apply the same factors for as fraud.

If the gift is deemed unreasonable, the beneficiary keeps half of the proceeds and the surviving spouse gets the other half.

2) Torts & Damages to Property

In damage to property, insurance proceeds are what they replace, but if separate property is destroyed or stolen, the insurance proceeds are separate property.

As for personal injury, separate properties include:

A spouse recovery for personal injuries sustained during marriage, except for recovery for loss of earning capacity.

Loss of consortium.

And a parent's wrongful death claim.

And community properties include:

Lost wages,

Medical expenses,

And loss of service to community.

Management Powers

1) Sole or Joint Management Properties

Sole management property includes personal salary and income from separate property.

Property that is not sole management property is joint management unless spouses have an agreement that the property can be managed solely by one spouse.

Joint management property requires consent of both spouses to convey or encumber it.

Homestead is always joint management property regardless of whether it is separate property or community property.

2) Presumption

Lastly, there is a presumption that it is a sole management property if the property is held in just one spouse's name, but the bona fide purchaser who buys without notice takes free of their possession.

Creditors Rights

1) General Rules

One: Contract debts are presumed joint debt if acquired during marriage.

If only one spouse is obligated to pay the debt, a contract creditor can attach:

All separate property of debtor spouse. If debt is a necessity, the contract creditor can attach other spouse's separate property.

All sole management community property of debtor spouse.

And all joint management community property. Here, community estate may be entitled to reimbursement if community property is used to pay a separate debt.

On the other hand, if both spouses are obligated to pay the debt, a contract creditor can attach:

All separate property of both spouses,

And all community property.

And second, regarding torts, if tort liability was incurred during marriage, a creditor can attach:

All community property,

And all separate property of the tortfeasor.

But if tort liability was incurred prior to marriage, the creditor can attach:

All separate property of the tortfeasor,

And all sole management community property of the tortfeasor.

2) Divorce

A Divorce has no effect on the personal liability of each spouse for debts incurred during marriage.

If both spouses sign a note during marriage, even if court orders one spouse to pay the note, the creditor may still sue the other spouse after divorce for nonpayment.

However, if one spouse does not sign, then he is not personally liable.

Lastly, if a creditor gets a judgment lien on one spouse, Court cannot enforce it against the other spouse.

The creditor should seek a constructive trust on the property if there is no one to enforce the judgment lien against.

Federal Civil Procedure.

Jurisdiction and Venue.

1) Subject Matter Jurisdiction

Subject Matter Jurisdiction involves the court's power over a particular type of case.

There are two types of courts: Federal court and state court.

There are different types of cases that are heard in these courts.

Federal courts first: 2 types of cases that can be heard in the federal court: Diversity of citizenship cases and federal question cases:

It is a diversity of citizenship case when the amount in controversy exceeds 75,000 dollars, excluding interest and costs, and when the action is between citizens of different states.

Regarding the amount in controversy, which exceeds 75,000 dollars, excluding interest and costs, whatever the plaintiff claims in good faith is controlling, unless it is clear to a legal certainty that it will not exceed 75,000 dollars. If the plaintiff sues for more than 75,000 dollars, but recovers less than that amount, jurisdiction is still appropriate, but he may have to pay the defendant's costs. Claims may be aggregated only if there is one plaintiff verses one defendant. Aggregation simply means to add together two or more claims to meet the amount requirement.

However, if one plaintiff sues more than one defendant in a joint claim, the total value of the claim can be used to meet the amount in controversy requirement. Next, another requirement of diversity of citizenship case is that the action must be between citizens of different states or countries. Let me better define that. An action is diverse when: One: Parties are citizens of different states at the time the case is filed. However, there is no diversity of citizenship if any plaintiff is a citizen of the same state as any defendant. And two: Parties include a citizen of one state and a citizen or subject of a foreign country at the time the case is filed. To elaborate, the citizenship of a person is the state where he is domiciled. There must be presence in the state at some point with intent to make it his permanent home. Here, the intent can be found through paying in-state tuition, voting, and etc. Also, a person can only have one domicile at any given time For decedents, minors, and incompetents represented in litigation by a fiduciary such as a guardian ad litem, committee, conservator, or executor, the citizenship of the decedent, minor, or incompetent controls, not the citizenship of the fiduciary. Nevertheless, in class action suits, the citizenship of the representative controls. On the other hand, corporations can be citizens of more than one state. Corporations can be citizens of all states where they are incorporated and the one state where a corporation has its "principal place of business". Many courts use the nerve center, which is the headquarters of a corporation or where the corporation does more business activity than anywhere else. There's also a way to determine the citizenship for partnerships. For an unincorporated partnership, the citizenship of all members is important, and it is possible that a partnership could be a citizen of all 50 states, where there will be no diversity jurisdiction.

In contrast, for incorporated partnership, the citizenship is where it is incorporated.

Moving on to exclusions of federal courts, even if the requirements for diversity jurisdiction are met, federal courts will not hear cases involving "issuance of a divorce, alimony, or child custody decree" or the probate of an estate.

Now, there is no subject matter jurisdiction when a party has been improperly or collusively made or joined to invoke jurisdiction.

For Example, A, a citizen of California, wants to sue B, who is also a citizen of California. A assigns his claim to C, a citizen of New York, and C then sues B. This is not a valid federal case if C is a mere collection agent for A, with no real interest in the case.

Alright, the second type of cases is the Federal Question Case, which arises when a plaintiff's complaint shows a right or interest founded substantially on federal law such as federal constitution and federal legislation. Here, the plaintiff sues to vindicate a federal right.

Unlike diversity of citizenship cases, citizenship is irrelevant and there is no amount in controversy requirement for federal question cases.

Some federal question cases, such as patent infringement, federal antitrust and securities claims, have exclusive federal jurisdiction and can only go to federal court.

There is also the Well-Pleaded Complaint Rule for federal question cases.

To follow the rule, basically ask: If the complaint were well pleaded, just stating the plaintiff's claim without extraneous matters unrelated to the claim, would it arise under federal law? And is the plaintiff enforcing a federal right?

If so, that claim invokes federal question jurisdiction.

For Example, Mayberry gives Gomer a lifetime pass in settlement of a claim. After several years, Mayberry refuses to honor the pass, asserting that a federal statute prohibits such passes. Gomer sues Mayberry for specific performance, alleging that the statute does not apply. His complaint mentions a federal law, but there is no federal question because he is not seeking to enforce a federal right.

His complaint mentions a federal law, but there is no federal question because he is not seeking to enforce a federal right. Furthermore, there may be additional state claims joined to the federal case, but for every single claim joined in federal court, there must be a basis of subject matter jurisdiction such as diversity jurisdiction, federal question, or supplemental jurisdiction.

That brings us to Supplemental Jurisdiction, which is the authority of federal courts to hear additional claims substantially related to the original claim even though the court would lack the subject-matter jurisdiction to hear the additional claims independently.

To be a pendant supplemental jurisdiction, the claim must be asserted by the plaintiff in a federal question case and it must arise from a common nucleus of operative fact, which means that it is from the same transaction or occurrence.

Even if these requirements are met, the court has discretion to not hear the supplemental claim if the federal question is dismissed early in the proceedings or if the state law is complex or state law issues would predominate.

To be an ancillary supplemental jurisdiction, the claim must be asserted by anyone but the plaintiff in a diversity or federal question case, and it must also arise from a common nucleus of operative fact as the underlying case, which, again, means it is from the same transaction or occurrence.

And again, even if these requirements are met, the court has discretion to not hear the supplemental claim if the federal question is dismissed early in the proceedings or if the state law is complex or state law issues would predominate.

That concludes information on federal courts, let's change gears and look at state courts. Basically, all cases that federal court does not have subject matter jurisdiction over are under the state court.

Now, removal allows defendants to have a case filed in the state court "removed" to federal court.

A case may be removed under these circumstances:

One: The defendant may remove an action that could have originally been brought by the plaintiff in federal court to state court.

And two: If the case invokes federal question jurisdiction or diversity of citizenship jurisdiction.

On the other hand, there are times when a case cannot be removed.

Example: In diversity cases, removal is not available if any defendant is a citizen of the forum state. Also, removal is not available more than one year after the case was filed in state court.

Also, if all defendants agree, then the plaintiffs cannot remove, even if they are defendants in a counterclaim.

Exceptions apply:

One, if there is a separate and independent federal question claim against one defendant, he can remove the whole case, including state claims.

And Two, removal is made within 30 days of service of the first document that makes the case removable.

Example of such document: The complaint or dismissal of a Defendant who prevented the removal.

The court can, however, in its discretion, remand state law issues back to state court after removal.

There is a 4-step procedure for removal:

One: The defendant files a notice of removal in federal court, which sets forth the grounds for removal, is signed under Rule 11, and contains all documents served on Defendant in state court,

Two: A copy is given to all adverse parties,

Three: If removal is improper, the plaintiff has 30 days to move to remand the case back to state court,

And four: Federal court must remand the case to state court whenever it determines there is no federal subject matter jurisdiction.

In addition, a case can only be removed to the federal district embracing the state court the case was originally filed.

Lastly, the defendant who files a permissive counterclaim in state court waives the right to remove. However, filing a compulsory counterclaim in state court does not waive the right to remove.

2) Jurisdiction over Parties

Here, personal jurisdiction exists when the forum state has power over the defendant.

There are three steps to determine if the personal jurisdiction exists.

Step one is to determine if the forum's statute, such as the long-arm statute and attachment statute, has been satisfied.

Step two is to determine if there is any absolute basis of in personam jurisdiction.

In personam jurisdiction exists where the defendant:

Is domiciled in the state,

Is present and personally served with process in the state and not through trickery or force,

Consents to suit in the state,

And waives service or enters a general appearance in the suit.

And step three is to satisfy the constitution using the due process test.

Using the due process test, jurisdiction is constitutional when the defendant has "such minimum contacts with the forum state so that exercise of jurisdiction does not offend traditional notions of fair play and substantial justice".

There are two hurdles to jump here: Minimum contacts and reasonableness.

Minimum contact is based on three elements, the quantity and nature of the defendant's contacts, the relatedness between the defendant's contacts, and the interest of the forum.

The first element is the quantity and nature of the defendant's contacts. This means that we should look at the fact that if the defendant purposefully avails himself of the benefits and protections of the forum state and the foreseeability that the defendant could get sued in this forum.

The more foreseeable that the defendant could get sued in the forum that is acquiring the jurisdiction, the more likely that minimum contact is satisfied.

The second element is the relatedness between the defendant's contacts and the plaintiff's cause of action.

Relatedness may not be required if the defendant has substantial ties with the forum state, because then the defendant is subject to general personal jurisdiction and can be sued in the forum state for a claim arising anywhere in the world.

Example: The defendant is present when he is served, domiciled in the forum state, or is doing substantial continuous business.

The third element is the interest of the forum state in protecting its citizens, such as the interest in providing a forum for its citizens to challenge wrongful behavior.

To test the reasonableness of exercising jurisdiction, you can ask three questions:

Are the burdens placed on the defendant in defending in this forum reasonable?

Could the plaintiff be unreasonably burdened if he had to bring suit in another forum?

Are some witnesses or evidence located in this forum?

The defendant may complain that the forum state is inconvenient because it is far from his home, but this forum state will be appropriate unless it puts the defendant at a severe disadvantage in litigation. However, this is very tough to show.

3) Jurisdiction over Property

To have Jurisdiction over the defendant's property, constitutionality depends on whether the dispute is related to the property attached.

If the dispute is directly related to the land, the constitution is satisfied if the land is located within the forum state. In contrast, if the dispute is not related to the land, the constitution is only satisfied if the defendant's contacts with the forum state are sufficient

4) Service of Process & Notice

The plaintiff must arrange to have someone deliver to the defendant process a summons and a copy of the complaint. The summons is a formal court notice of a suit and time for response.

The plaintiff must serve process within 120 days of filing the complaint or else the case will be dismissed without prejudice unless plaintiff shows good cause for the delay.

Process may be served by any nonparty who is at least 18 years old and may take the form of:

One: Personal service. In this case, papers are given to defendant personally anywhere you find the defendant in the forum state unless defendant is present only to be a witness or party in another civil case.

Two: Substituted Service. Process can be left with someone other than the defendant if:

It is the defendant's usual abode

And the person being left with process is of suitable age and discretion and resides there

Three: Process can be delivered to the defendant's agent authorized to receive service.

Examples of Defendant's Agent:

A corporation's registered agent or any officer.

A state officer appointed by operation of law, such as a nonresident motorist and etc.

Four: Process may also take the form of waiver by mail. It can be mailed to the defendant by first class mail, postage prepaid, as long as the defendant returns the waiver form waiving the formal service within 30 days.

Now, if defendant does not return the waiver form, he must be served personally or by substituted service at his cost.

Or five: Process can be delivered to a defendant in another state as long as state law allows for it. E.g. with a long-arm statute.

As an exception, federal court can serve a defendant outside the forum state regardless of state law under the bulge rule or statutory interpleader.

These rules apply to formal service of process, by which a defendant is brought before the jurisdiction of the court.

Subsequent papers such as other pleadings, motions, discovery requests and responses, can be served by delivering or mailing the document to the party's attorney or pro se party. If mailed, three additional days are given for the required response time.

5) Venue, Forum Non Conveniens, & Transfer

Venue:

It is a civil action where jurisdiction is founded on a federal question or on diversity that can be brought in:

One: A judicial district where any defendant resides, or is domiciled, if all defendants reside in the same state,

Or two: A judicial district in which a substantial part of the transaction or occurrence gives rise to the claim occurred. If there is no district in which the action may otherwise be brought, such as if all the defendants reside in different states and the claim arose overseas, the action may be brought in:

One: In a diversity case, the action may be brought in a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced,

Or two: In a federal question case, the action may be brought in a judicial district where any defendant is "found".

For venue purposes, a defendant that is a corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.

As for local actions, actions concerning ownership, possession, or injury to land, including trespassing, must be filed in the district where the land lies.

Forum Non Conveniens:

The discretionary doctrine of forum non conveniens allows a federal court, for the convenience of the parties and witnesses, to transfer any civil action to any other division where it might have originally been brought, or if transfer is not possible, to dismiss the civil action without prejudice.

Federal courts cannot transfer cases to a foreign judicial system or a different state court system, so dismissal may be proper.

The court must evaluate both private and public factors in making its decision.

Public factors include:

Availability of an alternative forum;

The plaintiff's choice of forum;

The interest the forum state has in providing a forum for its residents;

What law applies;

And what community should be burdened with jury service.

Private factors include:

Convenience of the parties and witnesses;

Location of the evidence;

And where the accident or event took place.

The fact that a plaintiff may recover less in the other judicial system or court does not make transfer or dismissal improper.

Also, forum non conveniens is rarely granted if the plaintiff is a resident of the present forum.

Transfer of Venue

Definiton: Going from one federal district court to another.

A case can only be transferred to a federal district where the case could have been filed originally. In other words, the case

can only be transferred to a proper venue with personal jurisdiction over the defendant independent of any waiver by the defendant.

There are two statutes to know here:

One: If venue in the original forum is proper, the case may be transferred to another federal district court if needed for the convenience of the parties, the convenience of the witnesses, or the "interests of justice"

The court to which a case is transferred under this statute must apply the choice of law rules of the original court, even if the plaintiff initiates the transfer

And two: If venue in the original forum is improper, the court may transfer in the interests of justice or may dismiss the case.

The Law Used by Federal Courts.

1) State Law in Federal Court

Based on Erie Doctrine, a federal court in a diversity case must apply the substantive law of the state in which it is sitting, but must apply federal procedural rules.

Valid federal statutes or rules dealing with procedural matters will be applied over contrary state law. However, a federal law will not apply when its effect would be to toll a state statute of limitations because state law controls whether or not the statute of limitations is satisfied.

Substantive law areas where state laws apply include:

Elements of the claim

Choice of law rules

Statutes of limitations

And tolling

If there is no federal provision on point, but the federal judge does not want to apply state law, he can only do this if it is not substantive.

Factors the judge should use to determine if the law is substantive or not include:

One: The outcome. If application of the state law would affect the outcome of the case, then it is probably substantive.

Two: The balancing of interests. You may ask, "does either the federal government or state have an interest in applying its rule?"

Three: The avoidance of forum shopping. If the federal court does not apply state law on this issue, will it cause litigants to flock to federal court? If so, the court should probably apply state law

And four: If state substantive law is unclear, the federal court may certify the question to the state supreme court for clarification.

2) Federal Common Law

There remain several areas of law where federal common law is allowed to continue.

These areas fall into two basic categories:

One: Areas where Congress has given the courts power to develop substantive law,

And two: Areas where a federal rule of decision is necessary to protect uniquely federal interests.

Injunctions and Provisional Remedies

1) Injunctions

On the Exam: When a plaintiff seeks an injunction, discuss both the majority and minority rules.

For the majority rule, the amount in controversy requirement is met if the harm seeking to be prevented would harm the plaintiff by more than 75,000 dollars.

On the other hand, based on the minority rule, the amount in controversy requirement is met if it would cost the defendant more than 75,000 dollars to comply with the injunction.

2) Provisional Remedy

It is the preservation of the status quo until final disposition of a matter can occur.

And it includes garnishment and replevin, temporary restraining order, which may be made ex parte, and preliminary injunction, which requires some hearing.

There is a 3-part test that determines whether a prejudgment remedy meets the constitutional requirements when the government seeks deprivation on its own initiative.

The court must take into consideration:

One: The private interest of the party against whom the remedy is sought,

Two: The risk of erroneous deprivation as well as the probable value, if any, of addition or substitute safeguards,

And three: The moving party's interest.

Pre-Trial Procedures.

1) Pleading

Pleading covers:

Federal pleading

Federal rule 11

Complaint

The defendant's response

And answer

Federal pleading takes notice pleading, which means the pleading must convey enough contentions to allow a meaningful response. It does not require great detail, but it needs to notify the defendant about the relevant transaction or occurrences.

Under the Federal Rule eleven, attorneys, or pro se litigants, are required to sign all pleadings, written motions, and papers, except discovery documents, certifying, to the best of the attorney's knowledge and belief, after reasonable inquiry, that:

- One: The paper is not for an improper purpose;

- Two: The legal contentions are warranted by law or a nonfrivolous argument for change of the law;

- Three: The factual contentions have evidentiary support or are likely to after further investigation;

- And four: The denials of factual contentions have evidentiary support or are likely to after further investigation.

Certification is continuing, meaning certification is effective every time the paper is presented to Court. It could be filing, later advocating a position, and etc.

Now, a motion for a violation of Rule eleven is served, but not filed. The party allegedly violating the rule has 21 days, which is referred to as safe harbor, to fix the offending document. However, if the violator does not fix the document, the motion can be filed.

A few points on sanctions, sanctions:

Are discretionary,

May be levied against the attorney, the firm, or the party,

Should be sufficient to deter repeat of conduct,

And can be nonmonetary. Here, the court can also order a party to show cause of why sanctions should not be levied

Next, a complaint is a principal pleading by the plaintiff that commences the suit.

It must include:

A statement of subject matter jurisdiction;

A short and plain statement of the claim showing entitlement to relief;

And a demand for judgment.

And there are 3 matters that must be pleaded with particularity or specificity: Fraud, mistake, and special damages.

Special damages are damages that do not normally flow from an event.

Furthermore, the defendant's response follows Rule twelve.

Under rule twelve, the defendant must respond to a complaint in a motion or answer and no later than 20 days after the service of process.

The defendant risks default if he responses later than 20 days after the service of process.

Rule 12 Motions: There are two issues of form, 12 (e) and 12 (f). Motions must be brought by the defendant before filing a responsive pleading, or else they are waived.

Rule 12(e) is motion for a more definite statement, which can be filed when a pleading is so vague that the defendant cannot frame a response.

Rule 12(f) is motion to strike, which pares out immaterial allegations, cheap shots, and things that do not belong, such as a demand for a jury trial in a case where there is no right to a jury. Additionally, any party can bring a 12 (f) motion.

As for matters of abatement, waivable defenses that must be put in the defendant's first rule 12 response pre-answer motion or answer include:

One: Motions to dismiss due to:

Lack of personal jurisdiction

Improper venue

Insufficiency of process

And insufficient service of process

Two: Defenses that can be raised at anytime, which includes motions to dismiss due to:

Lack of subject matter jurisdiction

And failure to join an indispensable party

And three: Matters regarding the merits, which includes:

2(b)(6) failure to state a claim where relief can be granted must be brought by pre-answer motion or inserted in answer

12(c) judgment on the pleadings

And rule 56 motion for summary judgment

Finally, let's look at Answer. An answer is filed when the defendant decides not to file a motion or when his pre-answer motion is denied

There is a certain timing for responding with an answer.

A defendant must serve his answer no later than 20 days after service of process if he brought no pre-answer motions, or no later than 10 days after a court rules on a pre-answer motion.

Now, if he waives service of process, he has 60 days to answer, starting from the plaintiff's mailing of the waiver form.

Furthermore, the defendant's answer must contain responses to the allegation of the complaint and affirmative defenses.

To elaborate,

Responses to the allegations of the complaint can either be:

To admit;

To deny;

Or to state that he lacks sufficient information to admit or deny, which has the effect of a denial.

However, this statement cannot be used if the issue is a matter of public knowledge or is in the defendant's control. Failure to deny can constitute an admission, except to damages.

Also, affirmative defenses include statute of limitations, res judicata, the fact that the contract is not enforceable due to fraud, and etc.

2) Abstention Doctrines

When hearing the case would potentially intrude upon the powers of another court, Court may refuse to hear a case.

Discovery

Discovery covers:

Required disclosures

Discovery tools

Substantive scope of discovery

And enforcement of discovery rules and sanctions in detail

Required Disclosures

It must be produced even though no one asks for it. Required disclosures include initial disclosures, experts, pre-trial disclosure, and duty to supplement.

For the initial disclosures, unless court order or stipulation of the parties provides otherwise, within 14 days of a Rule 26(f) conference, the parties must identify persons and documents "likely to have discoverable information that the disclosing party may use to support its claims or defenses," as well computation of damages and insurance for all or part of judgment.

Also, as directed by the court, parties must identify experts "who may be used at trial" and produce a written report containing their opinions, data used, qualifications, compensation for the study, and etc.

Experts must be paid reasonable fees, and if an expert retained in anticipation of litigation is not expected to testify, no discovery will be allowed absent exceptional need.

Next, during pre-trial, no later than 30 days before trial, parties must produce detailed information about trial evidence, documents, and the identity of witnesses who will testify live or by deposition.

Discovery Tools

Tools cannot be used until there has been a Rule 26(f) conference, unless a court order or stipulation says otherwise.

Moreover, for discovery tools:

One: All substantive answers must be signed under oath

Two: Every discovery request and response must be signed by counsel certifying it is warranted, not interposed for improper purposes, and not unduly burdensome

And Three: For duty to supplement, if a party learns that its response to required disclosure is incomplete or incorrect, it must supplement its response.

There are different discovery tools and they are separated into tools that can be used to get information from both a non-party or a party and tools that can be used to get information from a party only.

Tools that can be used to get information from a non-party or a party include deposition and requests to produce.

In a deposition, questions can be oral or written and answers are oral, under oath, and in response to questions asked by each party or his counsel.

If deposition is used on a non-party, the non-party should be subpoenaed, or else he is not compelled to attend.

However, a party deponent does not have to be subpoenaed. A notice of the deposition, properly served, is sufficient to compel attendance.

A party cannot object at trial to any evidentiary question which could have been remedied at the deposition, and a party cannot take more than 10 depositions or depose the same person more than once. That is, unless court orders it or the parties stipulate to it.

Also, deposition is one day of seven hours, unless court order or the parties' stipulation says otherwise.

Depositions at trial are all subject to the rules of evidence and are used:

One: To impeach any deponent

Two: For any purpose if the deponent is an adverse party

And three: For any purpose, if the deponent is unavailable for trial, unless that absence was procured by the party seeking to introduce the evidence.

Another tool that can be used to get information from both a non-party and a party is requests to produce, which are requests by a party to another party, or, if accompanied by a subpoena, to a non-party, requesting that:

He needs to make certain document available for review and copying various documents or things

Or permission to enter upon designated property for inspection or measuring

Additionally, responses to a request to produce must be made within 30 days.

Moving on, tools that can be used to get information from a party only include interrogatories, physical or mental examination, and requests for admission.

For interrogatories, questions are in writing and answers are in writing and under oath.

The party receiving interrogatories must respond or object within 30 days. Here, the party can say they do not know the answer to a question, but only after reasonable investigation. If the answer could be found in business records and it would be burdensome to find it, the proponent can be allowed access to those records.

At trial, a party cannot use their own answers, but others may be used according to the regular rules of evidence.

Also, a party may only serve 25 interrogatories on another party, including subparts, unless a court order or party stipulation says otherwise.

The second tool that can be used to get information from a party only is physical or mental examination, which is only available through court order upon:

One: A showing that the party's, or a person in the party's control such as parent litigating on behalf of his child, health is in actual controversy;

And two: A showing of good cause.

Example of Good Cause: You need it and cannot get it elsewhere. The person examined may obtain a copy of the report without making this showing, but by requesting a copy without making this showing, he waives his doctor-patient privilege regarding reports by his doctors regarding the same condition.

And the third tool that can be used to get information from a party only is requests for admission, which is a request by one party to another party to admit the truth of any discoverable matters.

A party must respond to a request for admission within 30 days, and the response must either admit or deny the request. However, as an exception, the response can indicate a lack of information if the party has indicated that he has made a reasonable inquiry. A failure to deny is tantamount to admission, but the party can amend if the failure is not made in bad faith.

Substantive Scope of Discovery

A party can discover anything relevant to a claim or defense. For good cause, Court can allow discovery of anything relevant to the subject matter of the case.

Let me define "relevant" here. It is anything reasonably calculated to lead to admissible evidence. This means that you can discover stuff that may end up being not admissible.

Regarding evidentiary privileges, privileged matter is not discoverable.

Work product is another substantive scope of discovery. It is when trial preparation materials, which are material prepared in anticipation of litigation, is not discoverable.

It does not matter whether the material is prepared by the attorney, the party, or any representative of the party. The exception is that trial preparation materials are discoverable if there is substantial need and the information is not otherwise available.

Nonetheless, mental impressions, opinions, conclusions, and legal theories are absolutely protected from discovery.

Enforcement of Discovery Rules & Sanctions

First, discovery is usually worked out among the parties, without court intervention. In problem cases, Court can get involved.

And second, when making any motion against a party, the party must certify that he tried in good faith to get the materials from the other side by presenting one of the following five facts to the court.

One: The receiving party can seek a protective order under Rule 26

Two: The receiving party answers some discovery requests but objects to others

Three: The receiving party fails completely to attend a disposition, respond to interrogatories, or to respond to requests for production.

Four: The receiving party submits a false denial to a request to admit

And five: The receiving party unjustly fails to make a required disclosure

Possible sanctions for these five situations:

The first situation is when the receiving party can seek a protective order under Rule 26(c), such as a trade secret. Because the request is over burdensome and trade secrets are involved, their use should be limited to this case.

The second situation is that the receiving party answers some discovery requests, but objects to others.

If objections are not well taken, this is a partial violation, imposing a light sanction.

Let's cover the possible sanctions for different roles involved.

The possible sanction for parties is an order compelling answers, plus costs of associated with seeking the order.

If the party violates the new order, Court may impose the below penalties, plus costs and attorneys fees involved with seeking the order:

One: Impose an establishment order, which establishes the facts requested as true

Two: Strike pleadings of the disobedient party as to issues relating to discovery

And three: Disallow evidence from the disobedient party on such issues

On the other hand, if the party violates the order with bad faith, Court may dismiss the plaintiff's case or enter a default judgment against the Defendant

The violating party may also be held in contempt, except in cases involving refusal to submit to mental or physical exams. The possible sanction for non-parties is contempt for violating subpoenas or court orders.

And the possible sanction against the attorney is that the attorney may be liable for all expenses, including attorney's fees, incurred by the other side if he counseled one of these bad acts.

Next, the third situation is that the receiving party fails completely to attend a disposition, respond to interrogatories, or to respond to requests for production. This is a complete violation, which means heavy sanction.

Similar to the second situation, the possible sanction for parties is an order compelling answers, plus costs of associated with seeking the order.

If the party violates the new order, Court may impose the below penalties, plus costs and attorneys fees involved with seeking the order:

One: Impose an establishment order, which establishes the facts requested as true

Two: Strike pleadings of the disobedient party as to issues relating to discovery

And three: Disallow evidence from the disobedient party on such issues

On the other hand, if the party violates the order with bad faith, Court may dismiss the plaintiff's case or enter a default judgment against the Defendant

However, unlike the second situation, there can be no contempt, because the party did not violate any court order.

The possible sanction for non-parties is contempt for violating subpoenas or court orders.

And the possible sanction against the attorney is that the attorney may be liable for all expenses, including attorney's fees, incurred by the other side if he counseled one of these bad acts.

The fourth situation is that a receiving party submits a false denial to a request to admit. Here, the possible sanction is that the other party may recover only costs and attorney's fees related to having to prove this issue.

Possible sanctions against the attorney is also that the attorney may be liable for all expenses, including attorney's fees, incurred by the other side if he counseled one of these bad acts.

Lastly, the fifth situation is that the receiving party unjustly fails to make a required disclosure, and the sanctions is that the other party can choose to treat it as a partial answer or partial objection to the discovery request or as a complete failure to respond. The failing party may not later use that evidence at trial unless the failure was harmless or justified. Like all other ways, the possible sanction against the attorney is that the attorney may be liable for all expenses, including attorney's fees, incurred by the other side if he counseled one of these bad acts.

5) Adjudication without a Trial

The plaintiff may file one written notice of voluntary dismissal before the defendant answers or moves for summary judgment. If the voluntary dismissal is granted, the case will be dismissed without prejudice.

Next, there is default and default judgment.

The clerk is asked to enter a default on the docket, which is a purely ministerial act.

After the default is entered, the plaintiff may seek a default judgment, which will be enforced so that the plaintiff may recover money.

The clerk may enter a default judgment when:

There has been no response at all by the defendant within 20 days after service of process,

The claim is for a certain sum, plus costs,

The plaintiff gives an affidavit that the sum is owed,

And the defendant is not a minor or an incompetent.

After a hearing on damages, Court may enter a default judgment when any of the four prior things have not been established.

Also, when Court is going to hold a hearing on damages, the defendant is entitled to notice only if he has made an appearance, such as filing a motion to dismiss that was denied and etc.

Dismissal for failure to state a claim, which is a demurrer in some state courts, falls under Rule 12(b)(6).

Here, the defendant can move to dismiss for failure to state a claim prior to filing an answer.

Court takes all of the allegations of the plaintiff's complaint as true and asks: If Plaintiff shows what he alleged, would he win a judgment?

This motion tests only the sufficiency of the plaintiff's allegations and does not address evidence.

If Court grants the defendant's motion, it will probably allow the plaintiff to amend his complaint.

There are also motions for judgments.

The first is motion for a judgment on the pleadings. It does exactly the same thing as Rule 12(b)(6), but is filed after pleadings are closed after the defendant has filed an answer. And the second is motion for summary judgment.

Summary judgment must be granted if:

One: From the evidence such as affidavits, discovery materials, there is no genuine issue of material fact

And two: The moving party is entitled to judgment as a matter of law

Here, Court looks at the evidence proffered by the parties and it must be admissible.

The pleadings submitted by the parties are not evidence unless it is specifically told so in the facts or told they are verified pleadings, thus each party should put in evidence. Court will generally view the evidence in the light most favorable to the nonmoving party.

In addition, federal summary judgment may be filed 10 days within hearing, and the opposition may be filed 1 day before the hearing.

6) Pre-Trial Conference & Order

Under Rule 26(f), unless a court order says otherwise, at least 21 days before scheduling a conference or order, the parties must meet to discuss claims, defenses, and settlement.

A discovery plan must be presented by the parties to Court within 14 days. However, generally, parties cannot use discovery until after the Rule 26(f) meeting.

For scheduling order, unless local rules or a court order says otherwise, Court can hold a conference among counsel no more than 120 days after service of process on the defendant.

The conference is for scheduling cut-offs for joinder, amendment, motions, and the scheduling order sets these out as a blueprint for the litigation.

On the other hand, court may hold pretrial conferences as needed to expedite the case and foster settlement.

The final pretrial conference order basically supersedes the pleadings. However, it may be amended to prevent manifest justice or by conforming to the evidence, if the evidence beyond the pretrial conference order is proffered and not objected to.

The Trial Process

1) Jury Trials

The Seventh Amendment preserves the right to a jury trial in federal courts in all suits of "common law", which are actions at law where that seek for damages, but it does not preserve the right to a jury trial in federal courts in suits in equity seeking injunction.

If a case arises that involves both law and equity, the jury will decide the facts underlying the law issues first, and the judge will then decide the equity issues.

As a Reminder, a judge is bound by the jury's findings on the factual issues.

As for jury selection, which is also known as Voir Dire, each side has unlimited strikes of potential jurors for cause and three peremptory strikes, which must be used in a race and gender neutral manner.

2) Nonjury Trials

In a non-jury trial, the fact-finder is one or more professional judges rather than a jury.

All trials in equity, of petty criminal offenses and violations, and of small claims at law are non-jury trials.

In all other cases, whether criminal charges or civil claims at law, the defendant may also waive a jury and be subject to a bench trial.

3) Jury Instructions

Jury instruction is a set of legal rules that jurors must follow when the jury is deciding a civil or criminal case.

Jury instructions are given to the jury by the judge, who usually reads them aloud to the jury.

Also, juries are the trier of fact when they serve in a trial, meaning it's their job to sort through disputed accounts presented in evidence.

Wrong jury instructions are a ground for new trial.

In a federal court, there is right to a jury trial in civil cases. However, there is a requirement of demand.

4) Motions

Regarding this demand or motion for jury trial, a party must demand a jury trial in writing, either in a pleading or a separate document, no later than 10 days after service of the last pleading raise a jury-triable issue.

Verdicts and Judgments

1) Jury Verdicts

The verdict is the finding of the jury on the questions of fact submitted to it.

Once the judge receives the verdict, the judge enters judgment on the verdict. Now, before the judgment is entered, the verdict is subject to post-trial motions.

The judgment of the court is the final order in the case which is subject to appeal.

2) Judicial Findings & Conclusions

It is the conclusion reached after the investigation on a particular issue, such as Plaintiff was contributory negligent.

3) Directed Verdicts & Nonsuits

Directed verdict is a motion for judgment as a matter of law or a motion to take the case away from the jury.

The defendant can move for a directed verdict twice, at the close of the plaintiff's evidence and at the close of all evidence, and the plaintiff can move for a directed verdict at the close of all evidence.

Here, Court will grant the motion when reasonable people could not reach a decision to the contrary. And Court generally views the evidence in the light most favorable to nonmoving party. As for nonsuit, it is a motion taken by the plaintiff to release one or more of the defendants from liability.

For Example, if a plaintiff wishes to give up on the lawsuit, he can file a nonsuit to all defendants with Court, and all proceedings will stop.

Alternately, if a plaintiff settles with one of several defendants, he can file a nonsuit to that one settled case.

Moreover, a nonsuit is a right of the plaintiff, but it may be prevented if the defendant has pleaded for affirmative relief.

4) Post-Trial Motions

There are two types of motions:

One: Renewed motion for judgment as a matter of law, which used to be called a judgment notwithstanding the verdict or JNOV

And two: New trial motions

For renewed motion for judgment as a matter of law, if a party made a motion for a judgment as a matter of law at the close of all of the evidence, and then loses at trial, that party can file a renewed motion for judgment as a matter of law no later than 10 days after entry of judgment.

On the other hand, if the party failed to make a motion for a judgment as a matter of law at the close of all evidence, he is deemed to have waived the right to make the renewed motion for judgment as a matter of law.

Here, Court will grant the motion when reasonable people could not disagree on the result, and Court generally views the evidence in the light most favorable to the nonmoving party.

Regarding motion for a new trial, if a judgment has been entered, but errors committed at trial require a new trial, a party can move for a new trial no later than 10 days after entry of judgment.

There are five grounds for a new trial:

One: Error at trial makes the judgment unfair, such as wrong jury instructions or evidentiary ruling,

Two: New evidence surfaces that could not have been obtained with due diligence for the original trial,

Three: Prejudicial misconduct of a party, attorney, third party, or juror.

Example: A juror lied on voir dire or made independent investigation of the accident scene.

Four: Judgment is against the weight of the evidence. This is a serious error of judgment by the jury.

And five: Inadequate or excessive verdict.

The above are the five grounds for a new trial during post-trial motions.

5) Effect

Moving on, the fifth part is Effect, which includes claim and issue preclusion.

Generally, res judicata and collateral estoppel issues doctrines state that the court in The second case should apply the law of the system that was decided in the first case.

Res judicata is claim preclusion, while collateral estoppel issue is issue preclusion. Let's look at res judicata and collateral estoppel issues in detail.

Res Judicata is a claim preclusion that analyzes the validity of the judgment and the finality on the merits for each claim.

Once a valid and final judgment on the merits has been rendered on a particular cause of action, the plaintiff is barred by res judicata from trying the same cause of action against the same defendants in a later lawsuit.

Also, res judicata is limited to parties thus it does not bar similar causes of action brought by others.

Now, almost all judgments and involuntary dismissals are on the merits except for those based on:

One: Jurisdiction

Two: Venue, indispensable parties

Three: Dismissal under the statute of limitations, which occurs in some courts

Or four: Dismissal without prejudice, which also occurs only in some courts

Regarding the same cause of action, most jurisdictions define "cause of action" or "claim" as including any rights to relief arising from a transaction or occurrence or a series of related transactions.

However, according to the primary rights theory, some jurisdictions say there is a separate cause of action or claim for property damage and for personal injury, even if they were caused in a single transaction, because personal injury and property rights are different primary rights.

On the Bar Exam: Look to whether the second cause of action raises a different, but related, law that may require proof of additional or different elements. If so, argue that the causes of action are not the same.

Furthermore, res judicata bars subsequent causes of action arising out of the same transaction or occurrence which should have been asserted in the earlier lawsuit.

This is true unless it would be unfair to apply res judicata under the circumstances.

For Example, it would be unfair if the plaintiff did not become aware of the facts constituting the claim until after the first lawsuit.

Merger is when the one claiming res judicata in the second case won the first case, and res judicata is applied, whereas bar is when the one claiming res judicata in the second case lost the first case, and res judicata is applied.

Next, collateral estoppel is issue preclusion.

A final judgment on an issue for the plaintiff or defendant is conclusive in a subsequent action involving a different cause of action between them or their privies, as to issues actually litigated and essential and necessary to the judgment in the first action.

Here, the issue is deemed established in the second action.

Based on the due process requirement, collateral estoppel may only be asserted against someone who was a party, or was in privity with a party, to the first case.

Moreover, collateral estoppel may be used by different types of people under the traditional mutuality rule or modern rules. Based on the traditional mutuality rule, only someone who was a party to the original suit could use/benefit from collateral estoppel.

According to the present status of mutuality, in jurisdictions where the mutuality principal is being eroded away, courts will uphold collateral estoppel when:

The issue decided in The first case is identical to the issue raised in The second case;

There was a final judgment on the merits;

The party against whom the judgment is to be used had a fair opportunity to be heard on the critical issue;

And the posture of the case is such that it would not be unfair or inequitable to a party to apply collateral estoppel

In contrast, modern rules allow nonparties to use or take advantage of a prior judgment when it is claimed by either the non-mutual defensive or offensive collateral estoppel.

To elaborate, the defendant in the second case who was not a party to the first case is the non-mutual defensive collateral estoppel, and the plaintiff in the second case who was not a party to the first case in some cases if it is fair is the non-mutual offensive collateral estoppel.

There are four factors used to determine fairness:

One: Party collateral estoppel being asserted against had a full opportunity to litigate in The first case;
Two: Party collateral estoppel being asserted against could foresee multiple litigation;
Three: The plaintiff could not have joined easily in The first case;
And four: There are no inconsistent judgments on record.
For Example, there are no multiple litigation arriving at different results on the issue.

6) Appealability & Review

The sixth and last part of Verdicts and Judgments is Appealability and Review.

Under the Final Judgment Rule, a losing party can only appeal from a final judgment, which is an ultimate decision by the trial court on the merits of the entire case, when there is nothing else for the court to decide on the merits.

Denial of a motion for summary judgment and a grant of a motion for a new trial are not final judgments, while the grant or denial of a renewed motion for judgment as a matter of law is a final judgment.

Now let's look at Interlocutory Review, which is a non-final review and consists of six points I'd like to cover.

First: Interlocutory orders reviewable as a matter of right are: Orders granting, modifying, or refusing injunctions, Appointing or refusing to appoint receivers, Findings of patent infringement where only an accounting is left to be accomplished by the trial court, And orders affecting possession of property, such as attachments.
Second: The Interlocutory Appeals Act allows an appeal of a nonfinal order if the trial judge certifies that it involves a controlling issue of law as to which there is substantial ground for difference of opinion, and the court of appeals agrees to hear it.

Third: Under the Collateral Order Rule, the appellate court has discretion to hear and rule on an issue if it:

Is distinct from the merits of the case;

Involves an important legal question;

And is essentially unreviewable if we wait until final judgment.

Example: A claim by a state that it has 11th Amendment immunity.

Fourth: When more than one claim is presented in a case, such as a claim and counterclaim, or when there are multiple parties, the trial court may expressly direct entry of final judgment as to one or more of them if it makes an express finding that there is no just reason for delay.

Fifth: Extraordinary Writ is technically not an appeal. It is also not a substitute for appeal.
However, an original proceeding in appellate court to compel the trial judge to make or vacate a certain order.
Extraordinary writ is available only to enforce a clear legal duty.
And sixth: For class actions, court of appeals has discretion to review an order granting or denying certification of a class action, if review is sought within 10 days of the order.
The appeal does not stay proceedings at the trial court unless the trial judge or court of appeals so orders.

Taxation.

Income:

1) Summary

Federal income tax is a tax levied on the taxable income of people, corporations, or other legal entities.

Here, we'll look at taxable income, gross income, and transactions relating to the dissolution of a marriage.

2) Taxable Income

Under the federal tax law, taxable income is the adjusted gross income reduced by allowable deductions.

Basically, the equation to find the taxable income is the adjusted gross income minus allowable deductions.

It is the income against which tax rates are applied to compute an individual or entity's tax liability. The essence of taxable income is the accrual of some gain, profit, or benefit to a taxpayer.

3) Gross Income

Gross income includes all realized increases in wealth.

One: In personal injury awards, all punitive damage awards are taxed.

And while compensatory damages for non-physical injuries are taxed, compensatory damages for physical injuries are not taxed. For Example, if a parent recovers emotional distress damages after watching their child get injured, the damages are not taxed because the injury to the parent is viewed as stemming from a physical injury to his child. In contrast, if an employee sues his employer for emotional distress damages based on harassment, any recovery is taxable because this stems from a non-physical injury.

Two: Damages in a breach of employment contract case are taxable to the plaintiff employee.

Three: Employer paid insurance.

An employer can provide an employee up to \$50,000 of group term life insurance without paying tax.

Here, the employer may deduct any amount as a business expense, and the employee must include in income any amount over \$50,000. There is no exclusion for key employees unless the plan is non-discriminatory, such as a plan is offered to all employees.

Premiums and payment for hospital bills are never taxed to employees in a health and accident insurance provided by the employer. The employer may also deduct it as a business expense.

Four: If a business sues to recover lost profits, any recovery is taxable because it is received in lieu of taxable profits that would have been made by the business.

Five: Assignment of income services is taxable to the person who earns it.

Six: Assignment of income property is taxable to the person who owns the property

Seven: Rental property and related transactions.

Rent is generally taxable to the landlord and not deductible by the tenant.

Nonetheless, if services are rendered by the tenant in lieu of rent, then this is a barter transaction and the tenant has income earned in an amount equal to the fair market value of his services.

Eight: If a person borrows money, there is no income because of the obligation to repay. If, however, a person borrows money, and the lender later forgives a portion of the debt, there is an income equal to the amount of the note forgiven.

This means that the discharge of debt generally results in gross income. There are exceptions where the debtor is insolvent or in bankruptcy when debt is forgiven or if the debt is forgiven as a gift to the debtor.

For Example, if a debtor buys a house for \$50,000 and pays \$30,000 in cash and finances the remaining \$20,000 with the seller, then the seller forgives the \$20,000 debt, this \$20,000 is not income. Rather, it is treated as a decrease in the basis of the property. Thus, the debtor's new basis is \$30,000 instead of \$50,000.

Nine: Prizes and awards, which are always included in gross income unless the recipient satisfies all of the following, where:

The prize was given for religious, charitable, or scientific achievement,

The recipient was selected without action on his part,

The prize is not compensation for past or future services,

And the right to it is assigned to charity before it is received

Ten: If a taxpayer asserts a claim to property and uses it as if it were his own, the amount is includible in his gross income, even if it turns out that he must repay the amount in a later year.

For Example, in a case where employee receives a bonus by mistake.

The year in which he received bonus, bonus is included in income. However, he can then deduct the mistaken bonus the year in which bonus is repaid.

If the bonus is received and repaid in same year, then ignore it because it is a wash.

This same analysis applies when the money is embezzled, extorted or stolen in one year and repaid in another year.

And eleven: Gains from the sale of property are included in income.

The gain is equal to the amount received on the sale less the seller's adjusted basis in the property, and the gain from property is taxed only when it is realized, which means that the gain is only taxed when the property is sold or exchanged.

Alright, let's look at what gross income does not include.

Gross income does not include the value of property acquired by gift, bequest, devise or inheritance. There are four things that are not gross income I'd like to cover.

One: Gifts and bequests are generally not included in gross income.

Except, a bequest made in consideration for past services is included in gross income.

The recipient's basis in the gift is what the donor's basis was in the gift.

When a person dies owning property, making it an inherited property, the basis of the property is adjusted to equal the fair market value of the property on the date of death.

While a business gift is not taxable as income, in order to be excluded as a gift, the transfer must stem from a detached and disinterested generosity and not be quid pro quo.

Two: On moving expenses, if an employer reimburses a new employee for moving expenses, the employee does not have to report the payments as income if:

The new place of work is at least 50 miles farther from the old home,

And during the year that follows the move, the employee works full time for at least 39 weeks.

However, there is no deduction for indirect expenses. These expenses include meals while moving, house hunting trip, and temporary housing.

Three: Scholarships.

Gross income does not include a scholarship for tuition, fees, books, supplies and equipment required for courses at an educational institution.

The primary purpose of the scholarship has to further the education of a degree seeking candidate,
The money is required to be used for tuition, books and fees, and
The scholarship is not for past or future services.

Four: Property damages.

Generally, when property is destroyed or stolen, the insurance or award received is treated as a sale of the property and a gain to the taxpayer.

However, no gain is recognized if the award is reinvested within 2 years in a similar piece of property or venture.

4) Dissolution of Marriage

It includes tax consequences of alimony, child support and property settlements.

First, alimony is deductible to the payor and taxable to the recipient.

Second, child support is not deductible to the payor or taxable to the recipient.

On disguised alimony if payments end or are reduced when the child reaches a certain age, they are child support no matter what the name may be.

Like child support, property settlements are not deductible to the payor or taxable to the recipient. No gain or loss is recognized, and there is a carryover basis in the hands of the recipient.

An alimony must be in writing, pursuant to a written divorce or separation agreement.

Members of the same household, such as living together, is not allowed

Also, alimony must cease at the latest on death of the recipient, and payments must be in cash.

Lastly, even without a final divorce agreement, all the rules apply if there is a written separation agreement.

Deductable Income

In personal injury awards:

Legal fees associated with physical injuries are not deductible while legal fees allocable to punitive damages, and the legal fees associated with non-physical injuries are deductible.

Also, defendants may deduct both compensatory and punitive damages paid as business expenses.

Next, above the line deductions are subtracted from gross income to get the adjusted gross income.

These deductions are deductible because they represent a realized decrease in wealth.

Trade or business expenses are a type of above the line deductions.

This type of expense must be ordinary and necessary in nature. For Example, it can be rent, utilities, or salaries paid. Also, up to 50% of meals and business entertainment are deductible if they are incurred in an overall business situation.

Other above the line deductions include:

Depreciation expense on property.

Rental expenses by owner or landlord in renting a property.

Losses from the sale or exchange of property.

Educational loan expenses incurred up to \$2,500 if adjusted gross income is less than \$50,000.

Deduction for alimony.

Moving expenses.

And contributions to a traditional individual retirement account.

On the other hand, below the line deductions are the greater of itemized deductions or standard deduction.

There are eight types of below the line deductions.

One: Mortgage interest on debt incurred to acquire first or second home up to a total indebtedness of \$1,000,000.

Two: Mortgage interest on home equity loans on first or second home up to a total indebtedness of \$100,000. This does not matter what the money is used for as long as the loan is secured with the equity on the home.

Three: Property taxes, state, and local income taxes are deductible. Sales taxes are now deductible in Texas because Texas has no state income tax.

Four: Other interest expenses, depending on what the taxpayer does with the borrowed loan proceeds.

Business loans are probably deductible, while personal interests are not. Personal interests are loans used for personal purposes and not secured as a home equity loan.

Five: Education expense is deductible only if they maintain or improve necessary business skills and are not either the minimum requirement for entering a new field or qualifying the taxpayer for a new job.

Six: Uniform that cannot be worn elsewhere is deductible, which means business attire will likely not be deductible

Seven: Expenses incurred in a job search in the same field a taxpayer is already established in. These types of expenses are only deductible to the extent that they exceed 2% of adjusted gross income.

And eight: Hobby losses, which are expenses relating to an activity not primarily engaged in for profit, are deductible only to the extent of income.

However, if the activity is one primarily engaged in for profit, a taxpayer can deduct expenses even above income.

Moving on, non-deductible items include:

Daily meals.

Commuting.

Legal fees, which are generally not deductible because they are personal.

Nevertheless, they are deductible to the extent they pertain to tax advice or advice about alimony to the party receiving the alimony.

And personal losses in sale or use of personal goods or property, where one exception: Capital losses are deductible.

The standard deduction for a married filing jointly is \$10,000, for a married filing single is \$5,000, and for a single is \$5,000. Credits are dollar for dollar reduction in taxes, and educational credits are separated into 2 categories.

One: Hope Credit is the tax credit for college students in their first two years of college. It provides a tax credit of up to \$1,800 on the first \$2,400 of college tuition and fees.

And two: Lifetime Learning Credits is the tax credit for any person who takes college classes. It provides a tax credit of up to \$2,000 on the first \$10,000 of college tuition and fees.

In applying for credit, a taxpayer cannot take both credits in the same year for the same person.

The amount of the Hope Credit or Lifetime Learning Credit is limited over a phase-out range,

If a taxpayer's adjusted gross income is below the phase-out, his credits are not reduced.

And if a taxpayer's adjusted gross income is in the middle of the phase-out range, his credits will be reduced.

However, if a taxpayer's adjusted gross income exceeds the phase-out range, he is not eligible to claim any education tax credits.

As for the phase-out range, it is \$48,000 to \$58,000 for a single, head of household, or qualifying widow, and \$96,000 to \$116,000 for a married filing jointly.

6) Disposition of Property

On Exam: in a mortgage transaction, treat debt as equivalent to cash.

To elaborate, when a person purchases property and borrows to finance the purchase, the amount of debt is included in the basis. On the other hand, when a person sells property, and the buyer assumes the debt of the seller, it is treated like the buyer paid additional cash.

Like kind exchange is the exchange of real property for other real property or personal property for other personal property.

The rule is that, other than stock or securities, no gain or loss is recognized when property used in a trade or business or held for investment is exchanged solely for other property of a like kind.

The basis carries over unless cash or other boot is involved in the exchange.

Upon the sale of a personal residence, government does not recognize gain of up to \$250,000 for a single taxpayer or \$500,000 for couple married and filing jointly.

It may only use this rule once every 2 years and it must be taxpayer's personal residence.

Capital assets include all assets except for:

Inventory.

Depreciable property.

Real property used in a business.

Accounts receivable.

And Copyright, literary, musical, or artistic compositions in their creator's hands

Capital gain is the gain from the sale of a capital asset.

There is long and short term capital gain.

Long term capital gain means that a taxpayer has held it for 1 year and 1 day, which generally results in a better tax treatment.

Long term capital gain is taxed at a maximum rate of 15%, and at 5% if taxpayer pays a maximum of 10% on ordinary income, and it can tack holding periods together if the asset was acquired by a gift.

On the other hand, short term capital gain is taxed as ordinary income.

Though collectibles do not qualify for long term capital gain no matter how long they are held, if they are held for longer than 1 year and 1 day, they do qualify for a rate of 28%.

Capital loss is the loss from the sale of a capital asset.

Capital losses are deducted first against capital gains, and if they wipe out all capital gains, taxpayer can only deduct \$3,000 more in the current year.

Any additional loss may be carried forward and may be deducted in future years.

Also, while ordinary losses are deductible with no limitation, personal losses are never deductible.

7) Cost Recovery

It covers depreciation and its related matters.

In purchase of assets, the property used in either the trade or business or in the production of income that has a useful life of more than a year may not be expensed.

Rather, the taxpayer must capitalize the cost.

For Example, he must add the cost to the basis. The consequences of this depend on the type of asset in the matter.

Here, real property, such as office buildings, is depreciated using the straight line method.

For non-wasting assets, such as land, stocks or bonds, however, no depreciation deduction is permitted. The taxpayer recovers his investment, if at all, only when the asset is sold.

In cases of personal property, deductions are accelerated so that they are greater in early years and lower in the later years.

The time period over which cost is depreciated depends on the asset's recovery period, which can range from 3 -20 years.

And as for adjustment of basis for depreciation, each year, the taxpayer must reduce his basis in depreciable property by the amount that the taxpayer is entitled to deduct as depreciation.

For intangible personal property: There is a differentiation between the purchased and created intangible personal properties. The deduction for created intangible personal property is called amortization, which means that the cost is deducted ratably over the life of the asset for internally generated intangibles.

For purchase intangibles, typically acquired in the purchase of a business, the cost is deducted ratably over a 15 year period.

Furthermore, cost recovery for oil is highly tested in Texas.

The deduction is called depletion.

There are 2 kinds of depletion: Businesses can deduct the larger of cost depletion or percentage depletion in computing taxable income.

Cost depletion is a method by which the costs of natural resources are allocated to depletion over the accounting periods that make up the life of the asset.

For Example, an oil field costs \$100,000 to develop and has 10,000 barrels of oil. If the taxpayer extracts 1,000 barrels and sells them, it receives a cost depletion deduction of \$1000 times 10, which is a cost depletion deduction of \$10,000.

Large oil companies are only allowed to use cost depletion.

As for percentage depletion, deduction is based on a percentage of the gross income earned by selling the oil extracted at the wellhead.

Percentage depletion is 15% for oil.

Example: If oil is extracted and sold for \$10,000, the percentage depletion deduction is equal to 15% of \$10,000, which results in \$1500.

Personal Exemptions and Deductions

1) Joint Return

If parents file a joint return, they can claim 2 personal exemptions: 1 for each spouse and a dependency exemption for each child.

A child may not claim a personal exemption for himself if he has a parent who can claim him.

And in a divorced or separated parents case, the custodial parent is entitled to claim the child as a dependent.

2) Tax Accounting

There are seven things to know:

One: For kiddie tax, children under the age of 14 are taxed at their parent's highest marginal rate of tax on any unearned income of the child.

Unearned income is any income that comes from investments and other sources unrelated to employment services, and it does not apply to earned income.

Unearned Income Example: Babysitting.

Two: An accrual method taxpayer has income when the right to it is earned and the amount is ascertained. He deducts his expenses when the obligation is incurred and the amount ascertained.

Three: For a cash method taxpayer, income is recognized when cash is received, and deductions are taken when cash is paid. Common taxpayers include individuals, small businesses, and farms.

Four: Constructive receipt is money available to a taxpayer without substantial restriction. It is treated as if it has been received by the taxpayer.

Five: Prepaid expenses must be deducted as it is used up.

Six: Installment sales are the gain from selling property and recognized as the cash is received.

This means that tax will be due only when there is cash available to pay the tax.

The gain recognized is the profit percentage times the principal amount received.

And the profit percentage is the profit realized divided by the contract price.

And the last and seventh is the interest free loans.

In an interest free loan, the borrower is deemed to pay interest to the lender at the applicable federal rate.

Here, the lender gets interest income, which is taxed, and the borrower has interest expense, which may be deductible, depending on what borrower does with the loan proceeds.

Since the lender actually received no cash from the borrower, the interest income that the lender is deemed to receive is now deemed to be paid by the lender to the borrower.

The treatment of this deemed repayment of \$10,000 depends on the relationship of the parties.

The dividend goes to the borrower if the lender is a corporation and borrower is a shareholder.

The compensation goes to the borrower if the lender is the borrower's employer.

And the gift goes to the borrower if the motive is donative.

Corporate Tax

1) Formation of Controlled Corporation

When someone transfers an asset to a new corporation for all the stock of the new corporation, a controlled corporation is formed. There is no gain or loss recognized when 1 or more persons transfer property to a new or existing corporation in exchange for stock if, immediately after the exchange, the persons transferring the property own at least 80% of the stock of the corporation.

The transferor's basis is the old basis, minus cash and mortgages assumed, plus gain recognized.

However, the transferee does not recognize gain.

The transferee's basis is the transferor's basis increased by the gain recognized by the transferor.

2) Corporate Distributions from Controlled Corporations

Regular corporations pay tax themselves on their taxable income, which is computed in a manner very similar to the rules for individuals.

In addition, when these corporations pay dividends to their shareholders, the shareholders are also taxed on these dividends, although the rate of tax is now the same as capital gains.

3) S Corporations, LLC, & Partnerships

In S Corporations, LLC, and Partnerships, the entity does not pay tax.

Rather, their individual owners will recognize taxable income in the same year that the entity recognizes the income, even though no cash distribution is made.

4) Texas Franchise Tax Rule

Texas Franchise Tax Rule only applies to corporations and limited liability companies.

It does not apply to general or limited partnerships.

Moreover, franchise tax is imposed on corporations and limited liability companies actually doing business in Texas or authorized to do business in Texas.

And a corporation or limited liability company pays tax to the higher of:

25% of the taxpayer's capital, which is owner's equity in the taxpayer,

And 4.5% of the taxpayer's earned surplus, which is basically the same as the taxpayer's taxable income.

Estate

1) Summary

The federal estate tax is imposed on a decedent's gross estate, reduced by various deductions, including the Unlimited Marital Deduction available for property passing to a spouse.

Under the unified rate structure, lifetime gifts and transfers at death are taxed on a cumulative basis at a rate of 50%.

However, before any tax is imposed, each individual is entitled to the equivalent of a \$1,500,000 Unified Credit against the Federal Estate Tax and Federal Gift Tax.

2) Gross Estate

Gross estate is the value of all the total property transferred at the time of death.

It does not include:

Gratuitously acquired life estates and joint tenancy estates.

Bypass trust.

Or discretionary trusts where the decedent was beneficiary.

On the other hand, gross estate includes:

Future interests transferable at death

Insurance owned on the life of another

Any gift tax paid within 3 years of death

Transfers with retained life estate

One: Future interests transferable at death including:

Interests in tenancy in common property.

And rights in wholly or partially executory contracts.

Two: Insurance owned on the life of another including:

Half of community property.

And lifetime transfers more than \$11,000.

Three: Any gift tax paid within 3 years of death including:

Transferred stock with retained voting rights.

And trusts in which the decedent retained no right of revocation or no rights to direct use of money.

And four: Transfers in which the decedent retained a life estate including:

Joint tenants.

And general power of appointment.

3) Deductions

Next, the following estate may be deducted from the gross estate.

One: \$1,000,000 exemption unified credit.

Two: Expenses, indebtedness, and taxes.

Three: Casualty or theft losses.

Four: Charitable deduction, which is not subject to any percentage limitation.

Charitable remainder trust is not entitled to deduction unless it is an annuity trust or Unitrust.

An annuity trust pays a fixed amount of income each year to the donor or the donor's specified beneficiary.

When the donor dies, the remainder of the trust is transferred to the charity.

And Unitrust is where the beneficiary receives a fixed percentage of the net fair market value of the trust on an annual basis.

In the Unitrust, the beneficiary cannot be a charitable beneficiary, and the fixed percentage is not less than 5% of the trust's annual value.

The fifth estate that may be deducted from the gross estate is marital deduction.

The decedent has an unlimited transfer to spouse with no tax consequences until the second spouse dies.

It also includes outright dispositions and Qualified Terminable Interest Property Trust.

In a Qualified Terminable Interest Property Trust, the income goes to the spouse for life, even if there is a remarriage, and there is no other permissible beneficiary.

Here, the executor must make the Qualified Terminable Interest Property election on the estate tax return.

The sixth and last estate that may be deducted from the gross estate is the bypass trust.

Here, the beneficiary, usually the spouse, can be given a life interest in income with limited powers over trust principal.

This trust will not be included in his estate at death: The general power of attorney disqualifies it.

Gift

1) Summary

Federal gift tax is a tax on the transfer of property by one individual to another while receiving nothing, or less than full value, in return. The tax applies whether the donor intends the transfer to be a gift or not.

2) General Rules

One: The gift tax applies to the transfer by a gift of any property.

This means that a taxpayer makes a gift if he gives property without expecting to receive something of at least equal value in return, and if a taxpayer sells something at less than its full value or makes an interest-free or reduced-interest loan, he may be making a gift.

Two: The donor is generally responsible for paying the gift tax.

Three: Any gift is a taxable gift.

However, there are many exceptions to this rule.

Generally, the following gifts are not taxable gifts.

Those gifts not more than the annual exclusion for the calendar year.
Tuition or medical expenses taxpayer pays for a third party.
Gifts to taxpayer's spouse.
And gifts to a political organization for its use.
And four: Each spouse is entitled to the annual exclusion amount on the gift.
3) Annual Gift Exclusions
Lastly, the annual exclusion applies to gifts to each donee.
The annual exclusion is \$11,000 per donee per donor.
This must be a gift of present interest, and the gift tax return is only filed if the taxpayer exceeds this amount.
There is unlimited exclusion for tuition and medical payments only if the payments are made directly to the service provider.
Here, paying off the school loans does not qualify.
Also, a gift is incomplete for gift tax purposes if the transferor retains either:
The power to revoke the transfer,
Or the power to change the beneficiaries.

Note that in this year the Lifetime Exemption is \$5,000,000 instead of the typical \$1 million.

Oil and Natural Gas.

Rule of Capture and Oil and Gas Ownership

1) Rule of Capture

A landowner is entitled to all oil and gas that he brings to the surface by drilling even if it is drained from the adjacent owner's land.

However, the landowner cannot:

Negligently drain oil or gas.

Get stored gas because it is personal property.

Or illegally drain oil or gas in violation of a commission order, including underground trespass and willful injury or waste.

As for the adjacent owner's remedy, in conclusion, landowner owes no accounting to adjacent owner when landowner drained from the adjacent owner's land because adjacent owner must drill his own well to prevent drainage.

Kinds of Interests in Oil and Gas

1) General Rule

The owner of property has both a surface interest and mineral interest.

Surface interest is the rights of land ownership that remain after the mineral interest is severed.

Surface interest is subject to an implied easement of surface use by the mineral interest owner.

On the other hand, the mineral interest is simply the interest in the minerals.

2) Different Owners for Surface and Mineral Estate

Though the general rule is one owner has both interests, when one owner owns the surface and the other owner owns the mineral estate, the mineral estate is the dominant estate.

For Example, if the owner has a fee simple in Blackacre and conveys the deed to Minnie of that "all of the minerals in Blackacre", the owner has a fee simple in the surface and is the surface estate owner.

Here, Minnie has a fee simple in minerals and is the mineral estate owner.

Now, the mineral owner has a fee simple in the minerals, which means he has the vested and possessory rights.

He also has the following rights, which are referred to as the bundle of sticks.

The bundle of sticks include:

One: Executive right to sell or lease the minerals.

Two: Right to self-develop, where any of these rights can be severed.

Three: Exclusive right to explore, produce and develop the minerals.

Four: Right to use the surface estate as is reasonably necessary to develop the minerals.

And five: Exclusive right to grant leases for the minerals and get bonus, royalty, and delay rentals.

Bonus is an upfront payment for signing the lease. Royalty is a fractional share of any oil and gas produced

And delay rental is when the lessee exercises its option to delay drilling a well after the first year of the lease.

3) Non-Participating Royalty Interest Owners

First, a mineral estate owner can create a Non-Participating Royalty Interest in a third party by conveying in a deed, such a sale, gift or will, the right to receive a royalty share from any production of oil and gas on the mineral estate owner's tract of land.

The mineral estate owner can also create a Non-Participating Royalty Interest in himself by conveying his mineral interest but keeping a right to share if there is any royalty: This royalty is different from the mineral estate owner's royalty from leasing the mineral rights.

However, a Non-Participating Royalty Interest owner does not own a mineral interest and cannot lease the minerals. He can only reserve the right to collect royalty.

Furthermore, Royalty interest is a cost-free right to share in proceeds from sale of oil and gas. And it may last forever or for a fixed term.

Example:

The Owner of Blackacre conveys Blackacre to Apple and reserve half of all oil and gas royalties."

Since the owner has a Non-Participating Royalty Interest, he can receive royalties, but he cannot lease the minerals.

Under the condition that Apple owns Blackacre, both surface and minerals, which is burdened with Non-Participating Royalty Interest, if Apple leases mineral rights to the owner in exchange for one-eighth of the royalty, \$5,000 bonus and \$5 per acre delay rentals, then the owner has a right to half of the one-eighth of the royalty in the lease.

However, the owner does not have rights to half of the bonus or delay rental payments.

The owner who has the Non-Participating Mineral Interest follows rules that are similar to Non-Participating Royalty Interest owners, with the difference that he keeps the executive right to lease, rather than a right to royalty shares.

4) Non-Participating Mineral Interest Owner

Also, the Non-Participating Mineral Interest Owner can get a fraction of royalties, bonus, and delay rentals.

5) Calculation Examples

First Example: Owen, the owner of Blackacre, grants to Apple half of all royalties on Blackacre in return for \$7,000.

Here, Apple is a Non-Participating Royalty Interest owner, and Owen is a mineral estate owner burdened with Non-Participating Royalty Interest.

If Owen leases for a one-eighth royalty, then Apple gets half of the one-eighth royalty or one-sixteenth of oil and gas production.

On the other hand, if Owen leases for a one-sixth royalty, then Apple gets half of the one-sixth or one-twelve of oil and gas production.

Second Example: Owen grants Apple a one-sixteenth royalty on Blackacre.

If Owen leases for a one-eighth royalty, Apple gets one-sixteenth of production because it is a fixed, flat one-sixteenth Non-Participating Royalty Interest.

And Owen gets one-eighth royalty minus one-sixteenth royalty to Apple, which is also one-sixteenth royalty.

Third Example: Owen grants to Apple one-sixteenth of royalty on Blackacre.

The "of" in the sentence means to multiply the rate by one-sixteenth of whatever royalty is negotiated.

If Owen leases for a one-eighth royalty, then Apple gets one over sixteen multiplied by one over eighth, which equals one over 128th of royalty.

Protection of Rights and Adverse Possession

1) General

Regarding protection of rights, mineral and leasehold interests can be protected by trespass and slander of title suits.

2) Trespass

There are four types of trespass.

One: Ordinary trespass involves the entering and possessing the mineral estate without the right to do so.

For Example, if a lease expires and land is not producing, but the lessee stays on the land, then he is trespassing.

Two: Slant well drilling is the process of bottoming a well underneath someone else's tract.

Three: Geophysical or seismic trespass. Because the right to explore belongs to the owner of mineral estate, not the surface estate, geophysical trespass is referring to surface owner overstepping his boundaries into mineral estate owner's interest. So when the surface estate owner explores the mineral without consent, he has committed seismic trespass.

And four: Damage to the speculative lease value, where a wrongful lessee enters and drills a dry hole on tract and the lessor loses the lease value, such as a bonus, that he could have received before the world found out that his land was dry. There are three remedies

One: The remedy to ordinary trespass and slant well drilling is injunction and damage.

Two: The remedy for geophysical or seismic trespass is to waive trespass suit and sue in assumption for the market value of contract that should have been obtained before doing the seismic explorations.

And three: The remedy for speculative lease value is to waive trespass suit and sue in assumption for lost bonus as the damage. Moving on, in calculating damages, the amount of damages depends on whether the trespasser entered with good or bad faith.

For Example, if a person only has adverse title to surface and lease minerals to a third party, such as a trespasser, the amount the trespasser has to pay the rightful owner of minerals depends on the trespasser's good or bad faith belief that the mineral title belonged to that adverse possessor.

If he entered with bad faith, the damage is the revenues, without subtracting costs.

On the other hand, if he entered with good faith, the damage is the revenues minus costs. Here, he does not get to subtract costs of drilling a dry hole.

Now, authorized secondary recovery operation is not a trespass.

Moving on, in general, regarding slander of title, the owner may sue someone who maliciously and knowingly asserts a false claim to the land if it deprives the owner of a specific sale.

Damages of slander of title include the market value of property at the time of slander.

Lastly, let's look at the three types of adverse possession:

One: If the trespasser enters land where mineral interest has been severed and meets all elements for adverse possession, then he gets the title to surface.

On the other hand, he has to drill and produce for the statutory period to get the mineral interest.

Two: If the trespasser enters land where mineral interest has not been severed and meets all elements for adverse possession, then he gets title to both surface and minerals.

And three: If the severance of mineral and surface rights start after adverse possession begins, severance does not interrupt the adverse possessor's right to get the mineral interest by possession of the surface.

Effect of Divided Ownership

1) Co-Tenancy

Each co-tenant can drill and produce or lease his share without the consent of the other co-tenants.

Here, the leased co-tenant gets royalties, bonus, and delay rentals.

However, leased co-tenant has to pay the non-consenting co-tenants their share of the profits from production, and the share depends on how much each co-tenant owns.

The profit is revenues minus costs, which usually include drilling and operating costs.

The leased co-tenant cannot make the non-consenting co-tenant pay for dry hole costs.

The non-consenting co-tenant can ratify the lease and becomes entitled to his share of the royalties. Once he ratifies, he cannot change his mind and seek profits.

Also, co-tenants can always partition and lease their partitioned share without having to worry about the other co-tenant.

Partition in kind is favored over partition by sale, which means Court takes and sales property and divides it up.

2) Life Tenants

As for life tenants, the real property life tenants rule applies. Under this rule, a life tenant cannot commit waste against the remainderman.

To have a valid oil, gas, and mineral lease, a person must have both the life tenant and the remainderman.

Exceptions to the normal life estate rules include:

One: Under the open mines doctrine, if there is production or a lease in force when the life estate begins, then the life tenant gets all the royalty under this doctrine.

And two: If the lease was non-producing when the life estate began, then this right ends when that lease ends.

3) Mortgagor & Mortgagee

Rule: First lien in time, first in right.

However, a bank foreclosure could destroy a later in time lease. This is the reason subrogation clauses exist in valid oil, gas, and mineral leases.

Oil Gas and Mineral Lease

1) Leases

Regarding the interest this conveys, a lease conveys a fee simple determinable.

Regarding a lease's duration, it can last forever, but it will expire if:

There is no production at the end of a specified number of years, Or delay rentals are not properly paid.

As for benefit, the mineral estate owner who grants lease gets bonus, royalty, and delay rentals.

Example:

Mary grants an oil and gas lease to Owen for 10 years and as long as thereafter as oil and gas is produced.

In this case, Owen has a fee simple determinable, and Mary has a possibility of reverter in the minerals if there is no production or improper delay rentals.

Mary gets bonus, royalty, and delay rentals.

However, Mary cannot drill a well and produce oil because she is not a co-tenant with Owen and is just a lessor.

Essential Clauses

1) Granting Clause

The granting clause defines the rights given by the lessor to the lessee and describes the property.

It is usually followed by a Mother Hubbard Clause.

The language of the Mother Hubbard clause is "This lease also covers and includes all land owned by Lessor adjacent to the land described above."

And the purpose is to pick up small strips of land not specifically included in the granting clause because of mistakes in surveys or land descriptions, and etc.

2) Habendum Clause

The Habendum clause fixes the ultimate duration of the lease and provides for a term of years for so long as oil and gas are produced.

Here, the term of years is the primary term. It is followed by an indefinite grant, which is the secondary term.

During primary term, the lessee has no obligation to conduct drilling operations and secure production on the property unless the property is being drained.

However, production is necessary to extend the lease from the primary to secondary term, and production is actual production in paying quantities.

The production past the primary term must be continuous or the lease will expire.

The production in paying quantities is Revenues minus the lessor's royalty in the lease, and minus the operating costs.

Here, operating cost does not including drilling costs.

However, the following situations are not considered production: Discovery of oil and gas.

Pipeline to gas well not complete but have a contract to market the gas.

And there is no more demand, so the well is shut down for a period of time.

There are also some exceptions to production covered by different doctrines.

First, under the marginal well doctrine, if a well is making profit part of the year, the lease can continue if a reasonably prudent operator would continue to operate the well to make a profit.

Second, under the temporary cessation doctrine, a lease can continue if circumstances arise, causing well to stop producing temporarily.

This doctrine applies to any well, but only if there is a sudden stoppage, due to a mechanical breakdown or the like, which the lessee fixes diligently in a fairly short time.

And third, under the repudiation doctrine, if the lessor obstructs the lessee from developing the lease, the lessor can ask court to add the period of delay to the lease due to the obstruction.

3) Delay Rental Clause

The delay rental clause allows the lessee to delay drilling during the primary term by paying the lessor a stipulated sum. On Exam: Read the language carefully to determine this clause. If the lease says the lessee has right to extend lease by making payment by mail or personal delivery, lease will not terminate if payment is mailed on due date.

If the lease says the lessee has right to extend lease by making payment on certain day, lease will terminate if payment is just mailed on that day.

If the language says the lessee agrees either to drill or pay delay rentals, and the lessee does not pay or drill, lease does not terminate.

And if the language says the lease terminates unless the lessee pays delay rentals, and the lessee does not pay or drill, lease will terminate

Now, if the lessor accepts late payment of delay rentals, the lease is revived, and if the landowner grants a subsequent deed that refers to the prior lease as if it were still in effect, the lease is revived.

In effect, if the owner assigns his right to a third party, he must give notice to the lessee of the assignment so he knows where to send delay rentals.

Also, if the owner does not give notice, payments to the assignor are still valid against the assignee.

However, if the owner sends in late delay rentals to the assignor rather than the assignee, the lease is not revived as to the assignee.

If drilling operations are not commenced by a certain date, lease will terminate unless the lessee pays delay rentals.

Here, actual drilling is not required, and the lessee just has to perform physical acts on the surface with a good faith intent to pursue drilling.

4) Defensive Clauses

The general rule is that defensive clauses are added to the lease to modify the rule that the lease terminates after the primary term unless there is production in paying quantities. Defensive clauses can be tacked and are construed against the lessee.

There are six defensive clauses.

One: Dry hole clause defines what the lessee must do to maintain the lease after drilling a dry hole. It usually requires the lessee to pay delay rentals or drill another well.

Two: Continuous operations, also called, well completion clause prevents expiration of the lease at the end of the primary term if drilling operations are still in progress.

Three: Force majeure clause lists acts of God and other catastrophes beyond the reasonable control of the lessee that

excuse the lessee from performance. Such nonperformance will not be excused without one of these clauses

Four: Shut-in royalty clause permits the lessee to keep a lease if wells are shut-in, which means that the wells are not producing but are capable of producing, by paying a shut-in royalty.

Here, a well must be capable of production in paying quantities in order for the lessee to maintain the lease by paying shut-in royalties.

Also, the lessee cannot maintain a lease this way for dry holes.

Five: Cessation of production clause provides that cessation of production will not cause the lease to terminate as long as the lessee commences corrective work within a stated period of time.

And six: Pooling clause allows the lessee to hold several tracts under lease with production from just one well located on one of the tracts.

The language of the pooling clause is "Lessee has right to pool all or any part of the acreage covered by this lease".

Also under the pooling clause, production from any well on the pooled unit will satisfy the production requirement.

Pooling has to be in good faith.

And royalty is split between the different tract owners based on the acreage each contributed to the unit well.

Now, under the Pugh clause, also called, freestone rider clause, if only part of the acreage under the lease is pooled, the lease on the unpooled part is severed from the pooled acreage held under the lease.

The language of Pugh clause is "If only part of the acreage under lease is pooled, this lease shall be maintained only as to land included in the pooled unit".

Regarding the lessor's authority to pool prior Non-Participating Royalty Interest, including the holder's executive right to lease minerals, lessor has no power to pool the Non-Participating Royalty Interest.

However, regarding the authority to pool prior Non-Participating Royalty Interest, lessor who has been unlawfully pooled can ratify the pooling agreement and receive a share of production from a well located off his tract.

If one co-tenant signs a lease that covers the entire tract and contains a pooling clause, the other co-tenant can ratify the lease and receive a royalty share of any pooled production from a well located off the tract.

5) Administrative Clauses

There are eight of them.

One: Warranty clause permits the lessee to recover damages from the lessor if there is a failure of title

Two: Proportionate reduction clause allows the lessee to reduce royalties and delay rentals proportionately when the lessor owns less than the entire fee.

Here, the co-tenant owns three-fourth of property and leases it to another, and his royalty payments will be shared but he gets three-fourth.

Three: Subrogation clause allows the lessee to pay taxes or mortgages encumbering the property and to then step into the shoes of the former creditors.

Four: Equipment removal provisions: It allows the lessee to remove the equipment from well site after termination of lease.

Five: Assignment and change of ownership clause protects the lessee against a finding that he had constructive notice of assignments by a lessor.

If the assignment and change of ownership clause is used, the lessee may rely on his deed records until he receives property notice of a change of ownership.

Six: Separate ownership clause severs portions of the lease assigned by the lessee, so that liability for loss or breach will rest upon the owner who commits the breach.

This prevents termination of the entire lease if the assignee of a part of it fails in his obligations.

Seven: Surrender clause allows the lessee to terminate the lease as to any part of the leased premises.

However, the lessee is still liable for breaches occurring before the surrender.

And eight: Notice before forfeiture and judicial ascertainment clauses require that the lessor give notice to the lessee of alleged breaches and an opportunity to correct them.

6) Royalty Clause

It gives the lessor an interest in a portion of production, which is usually one-eighth of development and production, free of the costs of drilling.

However, the lessor has to share in the post-production costs, such as transportation.

Here, the failure to pay makes the lessee liable for breach but does not terminate the lease, but failure to pay shut-in royalties can terminate the lease under the habendum clause.

When the royalty clause includes a market value provision for gas, the gas is valued at the time of delivery.

Moreover, market value is determined by the current price of similar gas sold in the area, not by the price in the lessee's gas purchase contract.

The rule here is to take or pay payments.

To elaborate, royalty owners only share in payments made for gas produced, and royalty owners do not share in payments made for gas not produced.

Division Orders

1) General Rule

First, division orders tells the lessee, well operator, or purchaser of oil and gas how payments are to be divided among the royalty and mineral interest owners.

Also, they are binding until they are revoked, and they are always revocable.

2) 1991 Division Orders Act

The 1991 Division Orders Act applies to all Division Orders executed after August 26, 1991 and to royalty interest owners. The General Rule is that the lessee who pays according to the order is not liable even though one owner is later found to have been over or underpaid.

Here, while the underpaid owner can revoke the incorrect division order and receive correct future payments, the underpaid owner cannot recover for past deficiencies.

Division orders can clarify methods of paying royalty.

However, division orders cannot change or contradict a lease provision, other than market value royalties or covenant.

If it does, division orders is not valid and allows underpaid royalty interest owner to get past underpayments.

Example:

Lori is owed a one-sixth royalty under a lease from Owen, and Owen sends Lori a division order stating that Lori gets a one-eighth royalty.

Lori signs the division order and gets a 1/8 royalty, rather than a one-sixth royalty.

If 2 years later, Lori notices the mistake and revokes the bad division order, then Owen can recover past underpayments because the division order contradicted the lease.

3) Withholding Payments

Lastly, lessees or other payors may not withhold payments unless:
There is a title dispute or reasonable doubt regarding title,
Or the royalty owner or payee refuses to sign a standard
Division Orders.

Implied Covenants

1) Reasonably Prudent Operator

It is an implied covenant attached to lessee.

To clarify, the lessee will act as a reasonably prudent operator, and that a reasonably prudent operator will seek to do acts that are profitable.

Profitable means that revenues from oil or gas is greater than producing and drilling costs

The lessor has the burden of proof to prove that it would be profitable for the lessee to do a particular act.

2) Covenant to Protect against Drainage

The lessee promises that he will always protect the property from drainage.

To prove that the lessee violated this covenant, the lessor must show substantial drainage and that a reasonably prudent operator would drill to protect against the drainage.

For Example, drilling would be profitable

For damages, money damages are equal to the amount of royalties the lessor would have received if lessee had drilled.

And a conditional decree or order of the court directing the lessee to either:

Protect the well by drilling an offsetting well,

Or forfeit the area of the lease being drained.

3) Covenant to Market

It requires the lessee to market the oil and gas within a reasonable period of time at the best available price.

However, the market value royalty clause just requires the lessee to sell at the current market value price, not to bargain for a better price.

4) Covenant to Develop

Here, once oil and gas is discovered, the lessee promises to further develop the property.

There is no obligation to explore under this covenant, and the lessor must prove that there was a reasonable expectation of profit from drilling additional wells.

Special Conveyancing Problems

1) Executive Right

Executive right is the right to lease the mineral estate to others.

Persons who have an interest in the mineral estate but do not have the right to lease it are called nonparticipating mineral right owners.

The executive owner owes a duty of good faith and fair dealing to the nonexecutive owners.

However, if the executive owner is involved in egregious self dealing, he will be held to a fiduciary duty and can be sued for punitive damages.

Under the greatest possible estate rule, when a grantor deeds property to a grantee, all of the estate owned by the grantor passes to the grantee unless the grantor specifically reserves an interest in the deed.

This means that if the executive owner deeds property and does not expressly reserve his executive right in the deed, it has passed to the grantee.

2) Right to Use of Land Surface

When the mineral estate has been severed from the surface estate, this creates conflicts with the surface estate owner. Mineral estate is dominant and an implied easement to use the surface as is reasonably necessary is recognized.

This also means that the mineral estate owner does not have to pay the surface owner.

Lastly, under the accommodation doctrine, a mineral estate owner must accommodate the existing surface uses.

The burden of proof is completely on the surface estate owner when invoking the accommodation doctrine.

To summarize, the surface owner must show:

One, there is an existing use of the surface that the mineral owner is interfering with

Two, the mineral owner's usage of the surface is unreasonable, as measured by the usual, customary, and reasonable practices in the industry at the time and under like circumstances, and

Three, there are reasonable and practical alternatives available to the mineral owner in developing the minerals. However, the surface estate owner cannot require the mineral estate owner or lessee to go off of the land to get an alternative.

Example: Slant well drilling.

Interpretation of Minerals

1) General Rule

The conveyance of oil, gas, and other minerals raises the issue of what minerals are.

The surface destruction test applies before 1983. It states that if any reasonable method of extracting the substance would destroy the surface, the substance belongs to the surface estate. This includes building stone, limestone, caliches, surface shale, sand, gravel, water, lignite, and iron ore.

On the other hand, the ordinary and natural meaning test applies from 1983 to present, where minerals include all substances within the ordinary and natural meaning of the term.

2) Non-Participating Royalty Interest

With minerals, Non-Participating Royalty Interest Owners do not receive royalties on substances that belong to the surface owner. They only get royalty out of mineral estate.

3) Land Reserved to Texas

Land reserved to Texas keeps all minerals. In other word, if Texas reserves right to minerals, it keeps all minerals.

4) Conveyancing

Under the non-apportionment rule, royalties are usually not apportioned.

Instead, they are paid only to the owner of the tract containing the well unless the lease contains an entirety clause, which states that If the lease premises are ever owned separately, all royalties will be treated as the entirety and paid to the separate owners.

Here, payment of delay rentals will be apportioned among the owners.

In a community lease, when several landowners of adjacent tracts sign a single lease, it operates as an agreement to pool and they share royalties allocated proportionately based on acreage owned.

Example:

Apple owns 10 acres and Banana owns 30 acres. They are adjacent to each other, and they both sign a single lease, leasing the entire 40 acres to Owen.

If there is no entirety clause and if the lease is silent on how royalties are to be divided, royalties are shared proportionately. As a result, Apple gets one-fourth of the one-eighth royalty, and Banana gets three-fourth of the one-eighth royalty.

5) Fractional Interests Problems

Deeds are generally construed against the grantor. So if a deed is ambiguous, the grantor loses.

The Duhig doctrine only applies to deeds and does not apply to leases, which states that the middle guy usually loses.

On Exam: Apply the Duhig doctrine when there are 3 people involved and there is an over-conveyance.

Example:

Owen conveys to Apple, reserving a half mineral interest, then Apple conveys to Banana also reserving a half mineral interest. Accordingly, Banana believes that he has the other half mineral interest.

If Apple fails to inform Banana of Owen's half interest, then Apple loses.

As a result, Banana gets the half mineral interest, and Apple ends up with no mineral interest.

6) Mineral or Royalty Interest

Problems arise when there is an ambiguous grant of an interest so that a person cannot tell if it is a grant of a mineral or royalty interest.

One: If Apple conveys to Banana "half of all the oil and gas royalties" on Blackacre, then Banana has a royalty of half of one-eighth, which is one-sixteenth of all the production.

Two: When Apple conveys to Banana "half of all the oil and gas produced, marketed, and saved" from Blackacre, words produced and marketed mean a royalty interest, and Banana has a half royalty, which means half of production.

Three: When Apple conveys to Banana "half of all the oil and gas in, on, or under Blackacre", words in, on, or under means a mineral interest. Here, Banana owns half the mineral and is a co-tenant with Apple.

Four: The language conveys a mineral interest when Apple conveys to Banana "half of all the oil and gas in, on, under and that may be produced" from Blackacre:

This also means that Banana is a co-tenant and owns half the minerals.

Five: When Apple conveys to Banana, with the language "half of one-eighth of the usual mineral royalties on Blackacre is cost-free", watch for the "of." Here, Banana owns a royalty of half, times one-eighth, times one-eighth, which means he owns one-twenty-eighth of royalty.

And six: If Apple conveys to Banana "half of all the oil and gas rights to Blackacre, including half of all the bonuses, rentals, royalties, and profits from Blackacre, but Apple reserves the executive right on all of Blackacre", then Banana owns half the mineral, but it is nonparticipating, and Apple has the right to lease Banana's half of the minerals.

Furthermore, there are 2 factors indicating a royalty interest: When it is described as cost-free.

And when the grantee does not receive the right to lease.

Lastly, there are also 2 factors indicating mineral interest:

When the grantee's interest is cost-bearing.

And when the grantee's interest includes the right to lease.

Top Leasing

1) Definition

It is referring to a lease on property already under a lease.

2) Concurrent

And if top lease is made effective at the same time as the bottom lease, title is clouded and doctrine of obstruction will extend the duration of the bottom lease.

Texas Real Property.

Ownership

1) Present Estates

Interests in land are also called "Estates"

The first type of Estate is "Present Estates", which means an owner has interest in land now and not only in the future.

The most complete ownership, an absolute ownership with potentially infinite duration is "Fee Simple Absolute."

Fee Simple Absolute is created with the Language: "to A"

Fee Simple Absolute is:

"Freely Devisable", which means the right can be transferred in a will

"Descendible", which means it can be passed down to heirs

And "Alienable", which means the right can be transferred with inter-vivos

In Fee Simple Absolute, if a living person has no heirs, then there is no accompanying future Interest because all the interests are given to the grantee upfront

Let me quickly mention an abolished interest, "Fee Tail". Fee Tail used to be created by the language "to A and the heirs of his body". Now, it just creates Fee Simple Absolute.

Another type of estate is "Defeasible Fee Simple". This estate exists when a property is given to a person with some conditions.

The first type is "Fee Simple Determinable", which is created with the language:

"To A for so long as "a specified condition"

"To A during "a specified time"

Or "to A until..."

The grantor must use clear durational language, and if the stated condition is violated, then forfeiture is automatic.

Fee Simple Determinable is freely devisable, descendible, & alienable, but always subject to the condition.

Also, fee simple determinable comes with a future interest, the Possibility of Reverter, which is the grantor's future interest in land. If the condition was met, then the interest in land automatically goes back to the grantor.

The next defeasible fee simple is "Fee Simple Subject to Condition Subsequent". It is created by the language: "to A, but if X event occurs, the grantor reserves the right to reenter"

Basically, the grantor must use clear durational language and must carve out his right to reenter. Unlike Fee simple determinable, fee simple subject to condition is not automatically terminated, but it can be cut short at grantor's option, if the stated condition occurs.

The future interest that comes with it is "Right of Entry or Power of Termination". The Grantor has the power to terminate the grantee's right, but the termination does not happen automatically.

The next defeasible fee simple is "Fee Simple Subject to Executory Interest". This is created by the Language: "to A, but if X event occurs, then to B"

As you can see, someone other than the grantor takes the future interest. If the stated condition is broken, then the forfeiture is automatic, which is in favor of someone other than the grantor. This "someone" has the shifting executory interest.

Remember, these interests can only be created with a very specific language. Words of mere purpose, desire, hope, or intention are insufficient to create a defeasible fee.

Moreover, words that put absolute restraints or bans on alienation are void because the courts want to keep these estates alienable when possible to free the market

The next defeasible fee simple is life estate. It can be created with the language: "to A for life". This Estate is measured in explicit lifetime terms and never in terms of years.

If the life estate is measured by life other than the grantee such as "to A for the life of B", then it is called Life Estate pour autre vie.

In both life estates, the future interest is Reversion.

After the life of the designated person is passed, the property reverts back to the grantor automatically. As a result, the grantee or the tenant is entitled to all ordinary uses & profits of the land but cannot commit waste.

There are 3 major ways you can waste a property.

The first is "Voluntary" or "Affirmative Waste". Voluntary waste is referring to overt conduct that causes a decrease in value.

This means that life tenant must not consume or exploit natural resources on the property such as timber, oil, or minerals. However, if prior to the grant the land was used for exploitation, then it is ok for the grantee to keep exploiting the same thing.

Also, the grantee may use natural resources for reasonable repairs and maintenance. Naturally, the life tenant may also exploit if the grantor expressly granted the right to do so.

The second type of waste is "Permissive Waste". The Grantee or tenant must maintain premises in reasonably good repair and must pay ordinary taxes. If the grantee fails to do so, then it is Permissive Waste.

The third type of waste is "Ameliorative Waste". This one is a little anti-intuitive. When the life tenant acts to enhance property's value, it is considered Ameliorative Waste.

Life estate is not descendible or devisable because the interest in land reverts back to the grantor after the life estate is over. Life estate, however, is Alienable.

2) Cotenancy

Property can be owned by more than one person at a given time. The parties who own property jointly are referred to as co-tenants or joint tenants.

There are three kinds of Co-Tenancy estate:

Tenancy in Common

Joint tenancy with right of survivorship

And Tenancy by the Entirety.

The first Co-Tenancy is Tenancy in Common.

In a Tenancy in Common Estate, each Co-Tenant owns an individual part, with right to possess the whole

There is no right of survivorship, which means that if one owner dies, that owner's interest in the property will pass by inheritance to that owner's devisees or heirs either by will or by intestate succession.

Each interest is:

Descendible

Devisable

And Alienable

When an estate is unclear about what type of Co-Tenancy it is on the bar exam, the presumption favors Tenancy in Common.

Regarding the rights & duties of Co-Tenants in tenancy in common, all tenants must have the right to possess the whole property. No one tenant has the right to evict the others.

For Example, Jack and Mary bought the property together. Jack paid 80% and Mary 20%. Both of them will have the right to possess 100% of the property. Jack cannot tell Mary to stay in her 20% part of the property.

Also, Co-Tenant possession is not liable to others for rent, and a 3rd party rent should be shared among the co-tenants based on co-tenants' percentage of ownership.

Co-Tenant cannot acquire the title via adverse possession, unless there is an ouster, which means a Co-Tenant is refused access to his concurrent estate

Each Co-Tenant is responsible for their share of carrying costs such as taxes or mortgage by percentage of ownership.

Each Co-Tenant also enjoys the right to contribution for reasonable & necessary repairs, provided that he has notified the others the need for repair.

Co-Tenants do not have rights to contribution for improvements, but they are entitled to credit equal to any increase or decrease in value caused by efforts.

For Example, "A kid threw a baseball and broke Jack and Mary's property's window. Mary got Jack's approval and fixed it."

Mary is entitled to the contribution for the repairment from Jack.

After fixing the window, Mary decided to apply rhinestones to the window for a more decorative look.

Mary is not entitled to the contribution for improvement, but Mary is entitled to the increase or decrease in value by partition.

Co-tenant must not commit:

Voluntary

Permissive

Or ameliorative waste.

While a joint tenant or equity court can bring an action for partition, a private individual cannot.

Though Texas does not have joint tenancy, the general rules of joint tenancy is tested on MBE, so let's look at some information on joint tenancy.

It is the Dual ownership with right of survivorship, which means when one of the owners dies, his share passes automatically to the surviving joint tenants.

Accordingly, this interest is alienable, but not devisable or descendible.

To create a Joint Tenancy, Joint tenants must take their interests with the following four unities:

One: At the same time

Two: By the same Title

Three: In the same instrument

And Four: With the Identical Equal Interests and rights to possess the whole

The language must state the right of survivorship as joint tenants are disfavored because people use them to avoid probate. And the grantor must clearly state the right of survivorship.

People can use a Straw such as a Middleman to help them create a joint tenancy to satisfy the four unities.

Now let's discuss the severance of a Joint Tenancy.

A joint tenant can sell or transfer his interest during his lifetime, with or without the other joint tenant's consent or knowledge.

When the sale happens, it severs the four unities, and therefore there is a Tenancy in Common between the new buyer and the Joint Tenants. However, Joint Tenancy remains intact between the non-transferring Joint Tenants

Also, a joint tenant severing his share will sever it at time of entering into a contract, not at closing.

If a seller Joint Tenant dies while the property is in escrow, then the rest of the joint tenants cannot get the right of survivorship.

In Joint Tenancy, partition can be decided in several ways:

Through a voluntary agreement

Partition in kind in which the judge decides how to split the land up

Or through a forced sale, in which the land will be sold and proceeds will be divided.

I will go into the detail of mortgage in another section, but the general rule is that in the Title Theory of Mortgages, one Joint Tenant's execution of a Mortgage or a Lien on his share will sever the Joint Tenancy of the now encumbered share.

By contrast, the majority of states follow the lien theory of mortgages, whereby a joint tenant's execution of a mortgage on his interest will not sever the joint tenancy.

Moving on. Tenancy by the Entirety is a protected marital interest between husband and wife with the right of survivorship. It arises presumptively in any conveyance to husband and wife, unless otherwise stated.

Tenancy by entirety is a very protected form of ownership.

Example: Creditors of only one spouse cannot touch this tenancy by the entirety because there is no unilateral conveyance.

3) Future Interests

Interests in land that the owner may not enjoy now but may enjoy in the future. The first future interest is "Reversions."

An agreement such that one party, usually the grantee, is given a possessory interest in a property from another, usually the grantor, under the understanding that the interest will "revert" to the grantor at the expiration of the grantee's interest such as grantee's death or expiration of a term of years, etc.

For Example, "To A for 10 years." The grantor has the reversion.

The second future interest is "Remainders."

Remainders can be vested or contingent in a 3rd Party.

It is a future interest created in the grantee capable of becoming the possessor upon the expiration of prior possessory

estate created in the same conveyance in which the remainder was created.

For Example, "To A for life, then to B," B has the Remainders.

Remainderman always follows a preceding estate of known fixed duration like Life estate or Term of Years)

Remember, remainderman waits for the Preceding Estate to run its natural course and never follows a defeasible fee simple.

Also, Remainders are either vested or contingent.

Contingent is when the remainderman is unascertainable or subject to a condition precedent.

If remainderman meets the condition precedent, then the remainderman becomes an indefeasibly vested remainder.

It is worth noting that the grantor will always have the reversion.

Let's look at the "Vested Remainder" in detail.

To create an indefeasibly vested remainder, the language will be something like "to A for life, remainder to B"

If A is alive, then B has an indefeasibly vested remainder. At common law, if B predeceases A, B's heirs have the vested remainder.

In this case, the holder of the remainder is certain to acquire an estate in the future, with no strings attached.

The next type is "Vested Remainder Subject to Complete Defeasance"

It is created in a language like "to A for life, remainder to B, provided, however, that if B dies under the age of 25, then to C."

As you can see "the condition that follows the remainder" makes Vested Remainder subject to complete defeasance also vested remainder subject to a condition subsequent.

In this case, B has the vested remainder subject to total divestment.

B still takes the property if he is under 25 as long as he is alive, but if B died before 25, C will get it. C, therefore, has a shifting executory interest

Here, the remainder is not subject to a condition precedent. However, it is subject to a condition subsequent.

The difference between a condition precedent, which creates a contingent remainder, and a condition subsequent, which creates a vested remainder subject to complete defeasance, is where the conditional language is.

If the conditional language is before the passing to B, then it is a condition precedent and therefore a contingent remainder and grantor has a reversion.

If conditional language is after the passing to B, it is a vested remainder subject to complete defeasance.

Sometimes the Vested Remainder is subject to open.

That happens when the language is like "to A for life, then to B's children"

Children, in this case is the vested remainder subject to open.

A class is open if it is possible for others to enter and B has children at the time of the grant but may have more children.

Remainder is vested in a group of takers, at least one of whom is qualified to take possession.

Each class member's share is subject to partial diminution because additional takers not yet ascertained can still qualify as class members.

"Rule of Convenience" provides that a class closes whenever any member can demand possession.

In This Example, the class closes when either A dies or B dies.

Womb Rule states that a child in the womb at A's death who would be a member of the class if alive will share in the class.

A child in the womb is considered alive.

Some remainders are contingent remainder, they can be created in language like "to A for life, then to B's first child" or "to A for life, then, if B graduates, to B."

This is a remainder either created in an unascertained person OR is subject to a condition precedent, or BOTH.

Like a vested remainder, contingent remainder always accompanies a preceding estate of known fixed duration, like a life estate or a term of years.

Let me quickly go over some doctrines that have been abolished and how the new rules apply.

The first is "Rule of Destructibility."

At common law, a contingent remainder was destroyed if it was still contingent at the time the preceding estate ends.

Now it will create a fee simple subject to a springing executory interest.

Second abolished rule is "Shelley's Case."

Before, Shelley's case would apply if the language says: "to A for life, then on A's death, to A's heirs".

It will create a merger of the two interests and give A a fee simple absolute.

Now, if A has no heirs and A is alive, it will create a life estate and a reversion in the grantor. Heirs will then have a contingent remainder.

Next is the "Doctrine of Worthier Title". It applies when the language says the grantor conveys "to A for life, then to the grantor's heirs" Clearly, the grantor tries to create a future interest in his heirs

As Rule of construction, the grantor's intent controls.

If the grantor clearly intends to create a contingent remainder in his heirs, then that intent is binding.
The grantor would have a reversion when A dies

Now let's look at the executory interests.

The language that creates executory interests is something like:
to A, if and when he marries" (springing)

"to A, but if A does not use the land for farming, to B"
(shifting)

Executory interest is a future interest created in a transferee, which is not a remainder and takes effect by either cutting short some interest in another person or in the grantor or his heirs.

The shifting interest always follows a defeasible fee and cuts short someone other than the grantor's interest.

The springing interest, on the other hand, cuts short the grantor's interest such as "to A if and when he passes the bar exam, or to B"

A has a fee simple subject to B's shifting executory interest.

The last 2 future interests are Possibilities of Reverter and Powers of Termination

As mentioned previously, Possibilities of reverter is the future interest created with fee simple determinable

The grantor automatically gets the real property back if the grantee violates the condition

Powers of termination or right of entry, on the other hand, is the future interest created with fee simple subject to condition subsequent

A grantor has the power of termination when an estate will return to the grantor if a condition is violated and the grantor decides to reclaim the estate.

In addition, the grantor has to reclaim the estate.

Non-Freehold Estates

1) Tenancy for Years

The time period for the tenancy for years does not have to be for years. It can be for a specified period of time such as days or hours.

For Example, the period can be from June 1st of 2004 to the 23rd of 2004.

Under the Statute of Frauds, the tenancy for years that is over 1 year must be in writing.

To elaborate, 1 year tenancy without writing is valid, whereas 1 year and 1 day tenancy needs writing.

2) Periodic Tenancy

Time period for Periodic Tenancy is an ongoing, repetitive estate requiring one party to give notice of termination. It can be month to month or week to week.

There can be an express or implied creation of periodic tenancy. In other words, it can be created by express agreement or by implication when a lease is silent as to its duration.

If the lease does not specify how long it will last, duration is measured by the rent payment.

For Example, the lease is month to month if rent is paid monthly.

Example of Oral Lease Violating Statute of Frauds:

First, a landlord and possible tenant talking on the phone agree to a 5-year lease with rent at \$1,000 a year.

Then, the tenant sends in rent of first year, and the landlord accepts it.

In this situation, it is not a tenancy for years because of Statute of Frauds violation.

Instead, it is a periodic tenancy from year to year created by operation of law because the landlord accepted the check, and the period is determined by period covered by the rent check accepted.

The second most common pattern that creates a periodic tenancy by operation of law is the hold over tenant, where the tenant stays after the expiration of the lease but sends in another month's rent check, and the landlord accepts it.

It is a periodic tenancy for month to month because the landlord accepted the check, and the period is determined by the period covered by the rent check accepted.

Now, a periodic tenancy can be terminated by giving a proper notice.

This notice must be given in a time equal to the period of tenancy, and the landlord must give notice regarding the right on the effective day of termination.

One exception is that tenancy from year to year needs to give 6-month-notice.

Example of Periodic Tenancy: A month to month lease dictates a month's notice, so if Apple leases an estate to Banana on July 15th for a periodic tenancy of month to month and then in August, Banana wants to terminate the lease, Banana needs to give at least a month's notice, and make notice effective on the 14th of a month.

3) Tenancy at Will

Tenancy at Will can only come about if the parties expressly agree that the tenancy is at will and not for rent.

Tenancy at will can be terminated in the following ways:

By either party, at any time, without notice.

Death of either party.

Waste by the tenant.

Assignment by the tenant.

Transfer of title by the landlord.

And lease by the landlord to someone else.

4) Tenancy at Sufferance

When a holdover tenant has possession of the property, the landlord can either:

Hold the tenant as a trespasser and sue to throw the tenant off the property and recover damages for the hold over,

Or impose a new periodic tenancy on the tenant:

For residential property, the new period is month to month no matter how long the prior lease was for.

On the other hand, for commercial property, the new period is:

Year to year if the old expired tenancy was for 1 year or more.

Or the rent period of the old tenancy if the old expired tenancy was for less than 1 year.

Also, the landlord cannot impose a new tenancy on a holdover tenant if it is not reasonable.

For Example, if the holdover was just a few hours or out of the tenant's control, the landlord cannot impose a new tenancy. And if the landlord tells the tenant of the higher rent before expiration of the old lease, and then the tenant holds over, the landlord can impose a new periodic tenancy at the higher rent.

Duties of Landlord and Tenant

1) Tenant's Duties

If a lease is silent, the tenant remains liable to pay rent even if fire, flood, storms or other acts of God cause the property to be rendered completely uninhabitable.

Again, this is so unless the lease says otherwise.

There is also a duty not to commit waste when the lease is silent.

In contrast, if the lease says that the tenant has duty to repair the premises, the tenant is liable for all damage to the property regardless of their cause.

This means that even if third parties or acts of God were the cause, the tenant is still liable.

However, the tenant is not liable for normal wear and tear.

Opposite of MBE, in Texas, a tenant can terminate the lease if the premises are rendered totally untenable.

2) Landlord's Remedies

Next, Landlord's Remedies toward the tenant vary according to how the tenant breaches the lease.

When the tenant fails to pay rent, the landlord can sue for damages and evict the tenant off the property.

And when the tenant abandons the lease, the landlord can either:

One: Treat the abandonment as an offer of surrender and retake the premises, where the tenant's liability is discharged as of the date retake premises.

Or two: Re-rent the premises and hold the tenant liable for any deficiency.

3) Landlord's Duties

First, the landlord must give the tenant possession of the premises when the lease begins, or the landlord breaches.

Second, an implied warranty of habitability gives a landlord the duty to deliver residential premises in a habitable condition.

This is an implied warranty that property is reasonably suited for residential use, and if the landlord breaches this implied warranty, the tenant can either:

Move out and end the lease

Or stay and sue for damages

There are three Texas specific rules within the implied warranty of habitability. In Texas:

One: There is no implied warranty of habitability.

Two: The landlord has to repair conditions that materially affect the physical health, or safety of an ordinary tenant.

Here, the tenant can either move out or stay. If he stays, he can either repair and deduct the cost of the repair or sue the landlord.

And three: Commercial leases have an implied warranty of suitability covering latent defects in essential facilities of the leased property.

Alright, moving on to the third duty of a landlord, there is an implied covenant of quiet enjoyment.

It is a covenant that promises that the grantee or tenant of an estate in real property will be able to possess the premises in peace, without disturbance by hostile claimants.

In every lease, the landlord promises that he will not breach this covenant.

However, this covenant is breached when there is a total eviction of Tenant, partial eviction of Tenant, Partial eviction by Third Party with better title, or constructive eviction of tenant.

The first breach is total eviction of the tenant.

For Example, when the tenant is thrown out on the street and completely locked out of his premise, there is a total eviction of the tenant.

Doing so terminates the lease, and the tenant does not have to pay anymore.

The second breach is partial eviction of the tenant.

For Example, the tenant is locked out of the basement.

Doing so will not terminate the lease, and the tenant can stay but does not have to pay rent.

The third breach is partial eviction by a third party with better title.

For Example, a landlord leases more properties than he owns, and the third party with a better title than the tenant partially evicts the tenant. In this case, the tenant's rent is apportioned.

And the fourth breach is constructive eviction of the tenant.

For Example, if there is a roach or mosquitoes infestation, even though the tenant is not locked out, there is a constructive eviction.

This is when the landlord fails to provide a service they are supposed to provide thus makes the premises uninhabitable.

Here, the tenant does not have to pay rent if:

Service was to be done only by the landlord.

There is a substantial interference.

Or if the tenant abandons the premises within a reasonable time after the breach.

Assignments and Subleases

1) General Rules

There is a restriction that tenants can assign or sublease unless the lease says otherwise.

In Texas, the tenant cannot assign or sublease unless the landlord gives permission.

And there is an exclusive possession. To be a tenant, a person has to have an exclusive possession of the property.

For Example, staying in a hotel is not a landlord-tenant situation, and tenants are able to leave at will without being held liable for extra days.

2) Assignment

Assignment is when a tenant transfers possession for the entire term remaining on the lease.

Here, the tenant is liable to the landlord if there is a privity of contract or privity of estate.

Privity of contract exists when there is an agreement between the parties or when an assignee expressly assumes the obligations under the lease.

And privity of estate exists only between the present landlord and present tenant.

In this case, liability will usually be for past due rent or other covenants that were not kept.

Example of Past Due Rent: Assume that the landlord enters into a 3 year lease with Apple, and after 1 year, Apple tells Banana that he will be leaving town and ask if Banana wants to take over the remaining lease. If Banana, the assignee, fails to pay rent, the landlord can sue Banana based on privity of estate and sue Apple, the assignor, based on privity of contract.

The rule is that rent always runs with the land.

Moving on, assignees are liable for other covenants made by the original tenant if they run with the land, which means covenants touch and concern the land.

In other words, covenants run with the land if performance of the covenant makes the land more valuable or useful.

To distinguish between the covenant that touches and concerns the land and the one that does not: If a lease has 2 covenants where the tenant promises to fix the fence and promises to pick up the landlord's mail, covenant to fix fence touches and concerns land and is enforceable against assignees, and covenant to pick up mail does not touch and concern land and is not enforceable against assignees.

Now, same rules apply to the landlord liabilities if the original landlord transfers the property to another landlord. The original landlord continues to be liable to the tenant because of privity of contract, and the successor landlord is liable if covenant runs with the land and there is privity of contract or estate.

3) Sublease

Different from assignment, a Sublease occurs when a tenant transfers possession for a term less than the balance of the lease remaining to a subtenant.

Example:

Assume that the landlord enters into a 3 year lease with Apple. After 1 year, Apple tells Banana that he will be leaving town for 4 months and asks if Banana would like to live in the apartment during that time.

If Banana then fails to pay, the landlord can sue only Apple but not Banana, the subtenant, because there is no privity of estate or contract.

As for tenants, the original tenant or sublessor is always liable while subtenant or sublessee is never liable.

4) Non-Assignment or Non-Sublease Clauses

Next, Non-Assignment or Non-Sublease Clauses are valid and enforceable.

Violating a clause makes the attempted transfer voidable at the option of the landlord, but if the landlord does nothing, nothing happens.

However, non-assignment or non-sublease clause is waivable. If the landlord gives permission to assign or lease, any clause is waived forever, unless the landlord states that he is still keeping his right to prevent assignments or subleases at the time he gave permission.

And if the landlord accepts rent check from an attempted assignee/sublessee, any clause is waived forever.

5) Condemnation/Eminent Domain

Condemnation and eminent domain is the power to take private property for public use by somebody of public character, following the payment of just compensation to the owner of that property.

In a partial taking of leased property, a tenant still has to pay full rent, but he gets a lump sum equal to the rent that he will have to pay over the remainder of the lease for the property taken.

On the other hand, if there is a full taking of leased property, the tenant does not have to pay any more rent.

Here, the tenant shares in the condemnation award up to the amount that the fair value of the lease exceeds the rent due under the lease.

For Example, if state takes all leased property, and the tenant pays \$1,000 per month under the lease, while the present fair rental value of the property is \$3,000 per month, the tenant does not have to pay any more rent and gets \$2,000 per month for each month left on the lease as the compensation.

6) Landlord's Tort Liability

Generally, the landlord has no duty to tenants or tenant's invitees for injuries on the premises during the life of the lease. However, there are five exceptions:

One: Latent defects

Two: Short term lease of a furnished dwelling

Three: Common areas under the landlord's control

Four: Negligent repairs

Or if the injury is caused by defects in the premises if the landlord knows or should have known.

Breaking these down, latent defect is a defect that the tenant does not know of, and a reasonable person in the tenant's position would not discover.

The landlord is under a duty to disclose latent defects he knows or should know about.

However, a landlord does not have a duty to repair but has duty to disclose.

The second exception is a short term lease of a furnished dwelling.

The landlord is strictly liable for defects when renting a furnished dwelling for less than 3 months. It does not matter if the landlord knows or should know the defects.

The third exception is common areas under the landlord's control, where the landlord is liable for an injury that occurs in an area subject to the landlord's control if he failed to exercise reasonable care.

The fourth exception is negligent repairs.

The landlord is strictly liable for any injury resulting from his repair of a defect in the premises.

Even though it is called negligent repairs, it is really strict liability.

In Texas, the landlord is liable only if the injured person is in the class of persons protected by the statute.

And the fifth exception is that the landlord is liable for injury caused by defects in the premises if landlord knows or should know that

There are major defects.

The tenant will not fix the defects,

And the public will be using the premises.

7) Tenant's Tort Liability

Tenant is liable to third party invitees for negligent failure to correct a dangerous condition on the premises even if the landlord is not liable.

Fixtures

1) General Rule

A fixture is a chattel that is attached to real property and has become a part of the real property and is no longer personal property.

Fixtures cannot be removed by owner or tenant.

Example: Washers and dryers are not fixtures because they can be removed

2) Residential Rental

The intent of the person who installed the item determines whether it is a fixture.

The more permanent the items are, the more likely they are fixtures.

If the items are normally taken by the tenants when they leave, then the items are less likely to be fixtures.

And the more extensive the damage, the more likely it is a fixture.

As for the timing of removal, if a tenant can remove the chattel, it must be removed before the end of the lease. And if

the owner can remove the chattel, it must be removed before closing.

3) Trade Fixture Doctrine

Chattels used in a trade or business are not fixtures and can be removed.

It allows removal before the expiration of the lease and allows removal a reasonable time after the expiration of the lease. Also, chattels used for business can be removed unless it has become structurally attached to the building.

Easements

1) Definition

Easements are the right of one person to enter the land of another and use it.

There are no easements for light, air and view.

2) Types

There are two Types of Easements: Easement appurtenant and easement in gross

Easement appurtenant is when there are 2 or more parcels of land next to each other, there is a dominant tenement and a servient tenement.

Dominant owner has right to enter onto land of servient owner. A transfer benefit is that easement of appurtenant runs with the land and goes automatically along with the dominant estate even if it is not mentioned in the conveyance deed.

For Example, if Apple has an easement appurtenant over Banana's land, and Apple sells to Candy but does not mention the easement to Candy, Candy would now have an easement over Banana's land. There is a transferring burden, however, where easement is always binding on subsequent holders of servient estates even if the easement is not mentioned in the deed if the subsequent holder had notice of the easement.

However, if the subsequent holder does not have notice of the easement, then the dominant owner loses the easement.

For Example, if Apple has an easement appurtenant over Banana's land, and Banana sells to Candy but does not mention the easement, which is not recorded in the deed. Apple does not have the easement anymore.

The second type of easement is Easement in Gross.

An easement in gross is not appurtenant to any estate in land, and there is only 1 parcel of land that is subject to an easement.

Example: An utility easement such as power lines and railroad tracks.

Easement in gross that is commercial can be transferred.

However, easement in gross that is personal cannot be transferred.

The transferring burden is that an easement in gross is always binding on subsequent holders of servient estates even if the easement is not mentioned in the conveyance, such as a deed, if the subsequent holder had notice of the easement.

3) Creation of Easement

There are three ways to create an easement:

Express easement

Prescriptive easement

Easement by implication

The first one we will go over is express easement. An express easement is clearly stated in a contract, deed, or will.

Express easement that lasts more than a year must be in writing to satisfy Statute of Frauds.

Second, prescriptive easement arises through an individual's use of land as opposed to the owner.

The use of prescriptive must be adverse to the owner, such as a trespass.

And the use must be continuous and uninterrupted. It does not have to be constant and can be seasonal use.

Use must also be for the statutory period.

On the MBE, statutory period is 20 years unless told otherwise.

And in Texas, it is 10 years.

Moreover, the use must be visible and notorious, which means the use is with the owner's knowledge and hostile.

Hostile means that the use is without the owner's permission.

Any grant of permission by the owner, even oral, will destroy hostility and thus no prescriptive easement.

Furthermore, easement can be implied in 2 ways.

One: Implied easement exists if a former dominant owner sells off a piece of his property to servient owner, and dominant owner's previous use of a path on servient owner's new property was:

Continuous,

Apparent,

And reasonably necessary.

Here, the servient owner must allow dominant owner continue to use the easement.

And two: Implied easement by necessity exists when property is landlocked.

Example of Being Landlocked: If a property has no access to a public street.

The owner of the servient estate can choose the location of the easement as long as it is a reasonable one.

For Example, if Owen conveys parcels of land to Apple, Banana, and Candy, and the deed does not mention access to the highway,

Apple and Candy do not have easements by implication because they have access to the highway. However, Banana does have an easement by implication over Candy's property because access to the highway is reasonably necessary.

4) Use

Terms of an easement control on questions of use.

If there are no terms and the easement is silent, there are 2 presumptions. It is presumed that:

The easement is perpetual.

And use is that of reasonable development of the dominant estate.

Nevertheless, there can be excessive use.

An easement can be used to benefit only the dominant estate, not other properties.

Use for the benefit of other properties is considered excessive use, which can be enjoined. Enjoin one use is not terminating the easement.

5) Repair

To repair easements, it must be necessary or reasonable.

A holder of easement must make necessary repairs and can always go on the servient estate to repair the easement even if it is not expressly granted.

In contrast, a holder of servient estate does not have to make repairs unless the easement specifically says so.

Also, the holder of easement must make reasonable restoration of the servient estate after repairs.

6) Termination

Now, there are eight methods to Terminate an Easement:

Merger

Written release

Abandonment by physical act

Estoppel

Prescription

End of necessity

Condemnation of servient estate

And destruction of servient estate

Breaking these down one at a time, merger occurs when the owner of dominant tenement and servient tenement become the same owner.

For Example, if Apple is the owner of dominant tenement and

Banana is the owner of servient tenement, and Apple buys

Banana's land, the easement ends by merger and vice versa.

Once an easement is terminated by merger, it is dead and never revives.

This means that if Apple sells Banana's old land to Candy, the easement is not revived.

Also, the release must be written and cannot be oral.

The third method is abandonment by a physical act. Mere non-use, no matter how long, is not abandonment.

The fourth way is by estoppels.

To terminate easement by estoppels, there must be:

One: A representation by the holder of the dominant estate that they are relinquishing their easement

And Two: A change of position in reliance by the holder of the servient estate.

The fifth way is by prescription, where the owner of servient estate must stop the use of the easement and keep it stopped for the statutory period.

The sixth is end of necessity. Once the necessity that created an easement by necessity is over, easement terminates.

The seventh is the condemnation of servient estate. The servient estate is taken away for public use for compensation.

And the eighth is, again, the destruction of servient estate.

7) Licenses

Licenses give a person the right to enter the land of another without being a trespasser

For Example, ticket holders are licensees and only have a right to view a game.

Also, lodging contracts do not create a lessor-tenant relationship. It only creates a licensor-licensee relationship. License is revocable, but a licensor may have to pay licensee contractual damages.

There is one situation where license is irrevocable: It is when an easement is attempted but fails due to Statute of Frauds, which makes the attempted easement a license, and the licensee spent money on the easement property.

8) Profits

Lastly, profit gives the right to go onto land and take a natural resource away, and along with a profit comes an implied easement to go onto the land.

Restrictive Covenants

1) General

There are two types of restrictive covenants:

Covenants running with the land.

And equitable servitudes.

Both of them are a right to restrict someone else's use of their land.

They are the exact same thing except that covenants running with land is enforced at law and the equitable servitude is enforced at equity.

On the Exam: To distinguish between the two types of restrictive covenants, first determine Plaintiff wants money or injunction

for his remedy. If he is suing for money then it will be a covenant running with the land, but if he is suing for an injunction, then it will be an equitable servitude.

2) Covenants Running with Land

To form Covenants Running with the Land, the following requirements need to be met.

One: The covenant must be created with an intent that it runs with the land.

Two: There must be a notice to the defendant.

Three: The covenant must touch and concern the land. Here, covenants not to compete do touch and concern land.

Four: There must be privity.

If the successor is the defendant, he needs both horizontal and vertical privities to be subject to the covenant. However, if the successor is the plaintiff, he only needs vertical privity to enforce the covenant against the defendant.

Horizontal privity exists when there is a conveyance between original parties. It needs a conveyance, not just a covenant between original parties.

In contrast, vertical privity exists between an original party and subsequent successors. It needs the successor to take the whole estate from person above him.

3) Equitable Servitude

To form equitable servitude, the following requirements have to be met:

One: There is an intent that the restriction is enforceable by successors,

Two: There must be a notice to the subsequent purchaser,

And three: Restriction must touch and concern the land.

In subdivisions and planned developments, burdens and benefits are often reciprocal. The following requirements have to be met to form reciprocal servitudes:

One: There must be an intent of the developer to create servitude on all the land in the subdivision. Intent is found if there is a common building plan.

And two: There must be a notice to the defendant. Notice can be actual, by record, or by inquiry.

To elaborate, a record notice is given as long as the restriction was in the chain of title, and regarding the inquiry notice, the defendant is assumed to have notice with anything that a reasonable inquiry might have revealed.

Defenses to enforcement of the restriction include:

Unclean hands

Acquiescence

Laches

And estoppel

Unclean hands means that the plaintiff did the same thing as the defendant.

Acquiescence is where the plaintiff allowed neighbors to do the same thing.

Latches is where the plaintiff sat by while the defendant violated restriction and is now complaining.

And estoppels is where the plaintiff promised the defendant earlier that he can violate restriction.

Lastly, release, merger, or changed circumstances can terminate the restriction.

However, changed circumstances terminate the restriction only if all lots in the subdivision are affected by the changed circumstances.

Adverse Possession

1) Definition

First, Adverse Possession is the process by which title to another's real property is acquired without compensation, by holding the property in a hostile and exclusive manner for a specified period of time.

2) Elements

Elements of adverse possession include:

Hostile

Exclusive

For a statutory period

Uninterrupted

Visible

And actual possession

One: Hostile, the possessor is on the property without the owner's consent.

Two: Exclusive. The possessor must be excluding others from possessing the property.

Three: The possession must last for a statutory period.

Generally, statutory period is 20 years unless told otherwise.

Regarding the statutory period in Texas, it is:

5 years if the possessor is there under color of title and pays all taxes

10 year if the possessor is in bare possession

And 25 years if the possessor paid taxes, under color of title, and owner had disability

Four: Uninterrupted. This means that the possessor's use is continuous that an ordinary owner would make.

Five: Visible: This means that the use has to be out in the open, but true owner does not have to know.

And six: Actual possession. The possessor must actually possess the land to get the title.

3) Special Rules

Alright, let's look at the nine Special Rules of adverse possession.

One: The true owner does not have to know trespasser is on the land.

Two: The trespasser can know he is trespassing, but the adverse possessor does not need to have a claim of right.

Three: There is no adverse possession against governmental land.

Four: The title acquired by adverse possession is not marketable. Though it is a good title, adverse possessor must get a court declaration to give marketable title.

Five: There are actual possession exceptions, where the leasing land to someone else is still actual possession and constructive adverse possession.

In a constructive adverse possession, if a possessor has a colored title, which means the title is defective to a larger tract, but only possess a part of the larger unit, the possessor has title to the rest of the property if:

The amount actually possessed is almost the whole.

For Example, the possessor has a valid title over 85 acres of a 100 acres land.

Or if the property is continuous.

Six: Concurrent owners: Adverse possession can only occur when possessing co-tenant excludes other co-tenants from possession and the statutory time limit runs.

Seven: Regarding future interests, for the life estate, the clock starts running when the life tenant dies.

For the fee simple determinable, the clock starts running when condition occurs.

And for fee simple subject to condition subsequent, the clock starts running when the grantor exercises his right of entry.

Eight: In general, the adverse possessor can tack periods of adverse possession, but the periods must pass directly from one adverse possessor to another without any gaps.

The adverse possessor can also tack periods of true ownership.

Example:

Apple and Banana owned a ranch but were never there.

Candy and Doughnut adversely possessed the ranch for 7 years then passed it onto Egg and Fish. Egg and Fish adversely possessed the ranch for 15 years.

And the period for adverse possession is 20 years.

Egg and Fish are adverse possessors because they tack on the prior 7 years from Candy and Doughnut.

If Apple and Banana had sold the ranch during this time of adverse possession to Greg and Hubert, the ranch would still belong to Egg and Fish because tacking counts on new owners, too. And nine, the last special rule is disability.

Disability refers to a person who is:

Minor,

Insane,

Or in jail.

Lastly, the effect on adverse possession clock is:

If the owner is under a disability at the time the adverse possession begins, the clock does not start until the owner is free of the disability.

And if disability arises after the adverse possession begins, it is an intervening disability and is ignored.

For Example, if Apple is a minor when adverse possession began and became insane after he turned 17, the clock does not start until he turns 18 even though he is insane.

Conveyancing Land

1) Process

The first step is that parties must sign a contract of sale.

Then at closing, they must get a deed.

2) Contract of Sale Requirements

The Contract of Sale requires writing

In other words, the contract of sale must be in writing. It must also be signed by the person who is being sued.

This writing can be anything as long as it contains:

Description of the property.

Names of the parties.

And price.

However, there is a substantial part performance exception, where writing may be unnecessary when the substantial part performance is given in the following manners.

One: the oral contract is clear.

And two: The buyer has taken possession and either pays the seller at least a part of the purchase price or make valuable improvements on the land. Here, simply making periodic cash payments will not work.

3) Effect of Signing a Contract of Sale

Third, there are Effects of Signing a Contract of Sale:

Once a contract of sale is signed, if property is damaged or destroyed before closing, the buyer loses because equitable conversion makes it the buyer's land and risk, even if the seller remains in possession and control, as long as it was not the seller's fault.

Differently, in Texas, the risk of loss is on the person in possession at the time the loss occurs.

Now, if the seller dies before closing, and the buyer closes with the seller's estate, the seller's interest, such as money

from the sale, is his personal property, and the person whom the seller left his personal property in his will gets the money. If the buyer dies before closing, and the seller closes with the buyer's estate, the buyer's interest, such as the title to property, is his real property, and the person to whom the buyer left his real property in his will gets the title.

Also, after the signing of the contract, there is an implied warranty that at closing, the seller will give the buyer marketable title.

Marketable title is not necessarily perfect, just one that a reasonable person would accept.

Also, the seller must give the buyer 3 things:

Proof of title

Title free of encumbrances

And the valid legal title on the day of closing

The proof of title is the abstract or copy of all deeds recorded in the chain of title.

For the title free of encumbrances, there are no easements, restrictive covenants, mortgages, options to purchase, and etc. that are not mentioned in the contract

Zoning is not an encumbrance unless property is in violation of a zoning ordinance

Violation of housing or building codes is not an encumbrance

And mortgage on the property is not an encumbrance if it is to be paid off out of the proceeds of the sale.

As for the valid legal title on the day of closing, if the buyer finds out on the day before closing that the seller does not have legal title, the seller cannot rescind the contract.

If the seller's title is unmarketable, the buyer can:

Rescind or walk away.

Sue for damages.

Or sue for specific performance. Here the buyer takes what the seller can give and the price gets lowered to cover the defect

Even if there is a closing day specified in the contract, the time of performance is not of the essence unless the contract says so or facts make it clear that is what the parties expected.

If time is not of the essence, performance must be tendered within a reasonable time after the date of closing. Here, 2 months late is usually considered within a reasonable time.

On the other hand, if the time of performance is of the essence and it is violated, the party who failed to perform on the date cannot enforce the contract.

4) Remedies for Breach of Sales Contract

The damage for the contract price is the value of land on the day of the breach.

Also, the buyer's deposit can be forfeited as liquidated damages if it is not more than 10% of the sales price.

Nevertheless, specific performance is available to both the buyer and the seller.

5) Defects on the Property

Now, the buyer cannot recover the Defects on the Property unless:
The seller did not disclose serious defects that were not obvious to the buyer and that the seller knew of,
Or the home is new and was sold by a builder-seller, in which case there is an implied warranty of fitness or merchantability.

6) Deed

Generally, acceptance of a deed by the grantee is presumed unless facts say otherwise, and no consideration is needed for a deed.

Recording a deed is not required to make it valid, and it only gives notice to the world.

In Texas, recording can be done if the deed is signed and notarized or signed and have 2 witnesses.

Once a deed is accepted, the contract of sale merges into the deed and is destroyed, and all contract provisions, such as the implied warranty, are lost unless:

One: The contract provisions are included in the deed

Or two: The contract says that they survive.

7) Passing Title under Deed

To pass a title under a deed, execution is required. In executing a deed, the deed must be signed by the seller. Here, forged deed means there is no conveyance.

And the deed must also adequately describe the land being conveyed. This description does not have to be specific, it simply needs to be able to identify the property. If the description is not adequate, it is void for vagueness and nothing transfers.

Additionally, land description by metes and bounds always controls over any other description.

Delivery of deeds does not mean physical transfer, instead, it is a question of intent.

That brings us to the delivery of deeds.

If facts show the intent to pass title, even if a grantor keeps the title to protect it, delivery has occurred.

Parol evidence is allowed to show the grantor's intent.

Now, recording a deed raises a presumption of delivery, even if the grantee never sees the deed and knows nothing about it.

Once delivery occurs, the title passes and later returning the deed to the grantor or tearing it up has no effect.

However, if the grantor dies and still has the deed in his possession, the presumption is that there is no delivery.

Also, it is a conditional delivery when the grantor hands over a deed but conditions delivery on some events.

Example of Condition is in Deed: Language says "Apple to Banana, but not until I die" and then the deed is handed to the grantee, Apple. This is a valid delivery of a future interest because Apple has a life estate, and Banana has a vested remainder. When there is an oral condition, disregard the oral condition if it is made at the time of delivery.

For Example, when the language was "Banana to Apple", and then the deed is handed to Banana with the statement "this is not effective until you marry my daughter Apple", the oral condition is disregarded. Here, Banana has nothing, and Apple has fee simple absolute.

In contrast, making the delivery conditional on the grantee's paying the purchase price is valid if the grantor makes delivery to a third party in escrow with instructions to deliver to the grantee when the condition is satisfied. Here, oral instructions are also appropriate.

After the delivery, the grantor cannot get the deed back. If the grantee satisfies the condition, the grantor cannot later change his mind.

8) Correction Deed

A correction deed is proper only where there is a mistake. For Example, a correction deed may come into place when there is a mistake regarding the acreage of the land conveyed in the original deed.

9) Covenants for Title

The grantee gets a quit claim deed when the grantor makes no promises regarding the title. Here, the grantee just gets what the grantor owns.

In contrast, the grantee gets a general warranty deed when the grantor makes promises regarding the title, and they are called covenants for title.

Covenants made can be either present or future.

A party can sue immediately upon the other party's breach of present covenants.

A promise that the seller has title and possession can validly convey both.

Also, a covenant against encumbrances is where the seller promises that there are no easements, liens, and etc.

Now, future covenants run with the land and can be enforced by all subsequent purchasers.

Future covenant for quiet enjoyment or covenant of warranty is where the seller promises that the seller will protect the buyer against anyone who later shows up and claims the title.

And future covenant of further assurance is a catchall covenant, where if the seller forgot to do something to pass valid title, the seller promises to do it.

Furthermore, the damages for the breach of covenant is the purchase price, which is the price received by the warrantor and incidental damages.

Here, the plaintiff does not get full recovery.

Sometimes there is estoppel by deed.

For Example, if Apple deeds property he does not own to Banana, and then Apple later gets title to it, Banana would have relied on estoppel by deed.

In Texas, this is called the Doctrine of After-Acquired Title.

Lastly, a deed to a dead person is void, but the dead person's estate can get specific performance to enforce the contract of sale.

Recording of Interests

1) Common Law

Generally, under common law, the rule for multiple purchasers is first in time, first in right.

For Example, if Apple conveys Blackacre to Banana then later conveys Blackacre to Candy, then Banana wins over Candy because he is the first in time.

2) Recording Statutes

Again, generally, the first recorded grantee wins.

However, it only protects the subsequent bona fide purchaser who pays value or subsequent mortgagees. Here, the value can be just about any amount.

In other words, recording statute does not protect judgment creditors or gratuitous grantees.

There are three types of statutes:

Texas pure notice statute

Pure race statute

And race notice

First, the Texas pure notice statute protects the subsequent bona fide purchaser who:

Pays value,

Without notice,

And with unrecorded deed. The rationale is that if the prior deed is recorded, there is notice.

On Exam: To find the Texas pure notice, look for "without notice" or in "good faith" only.

Second, the pure race statute states that whoever records first wins.

On Exam: In the pure race statute, there are no words of "without notice" or "in good faith."

And third, the race notice statute protects subsequent bona fide purchaser who:

Pays value,
Without notice,
And records first.

For Example, look for "first recorded" or "recorded first" and "without notice" or "in good faith" in the race notice statute. Similar to restrictive covenants, notice for property interest can be given in the forms of actual, record, or inquiry notice. First, an actual notice is delivered in such a way as to give legally sufficient assurance that actual knowledge of the matter has been conveyed.

The second form of notice is record notice. When something is recorded in the chain of title, the record notice is assumed. Here, recording at courthouse is not notice to the bona fide purchaser.

And recording too late is also not notice to bona fide purchaser since the record is outside the chain of title.

Example:

Apple sells Blackacre to Banana, but Banana does not record, then Apple sells Blackacre to Candy, and Candy records. Later on, Banana records, then, Candy sells Blackacre to Doughnut.

It is assumed that Doughnut does not have notice of sale to Banana and keeps Blackacre because Banana recorded out of the chain of title.

The third form notice is inquiry notice. If the deed says something that mentions an unrecorded transaction, the purchaser has to check it out or he will be deemed to have notice.

If the bona fide purchaser fails to go out and examine the land, and an examination would have shown someone on the land, he has notice.

Lastly, under the Shelter Rule, a person who does not give value or has notice of earlier sale will lose unless he took from a bona fide purchaser and thus have shelter rights.

Security Interests on Real Property

1) Types of Security Interests

There are:

Mortgages,
Installment land contract,
And deed of trust.

Mortgages include:

Purchase money mortgage,
Absolute deed,
And sale or leaseback with option to repurchase.

A deed of trust is given by the debtor to a third party trustee who holds it until a loan is paid off.

If the debtor does not pay, the trustee can order a sale or sell it on his own at a public auction.

And in Texas, an installment land contract is known as a contract for deed. Here, the debtor signs a contract promising to make payment and seller keeps title until loan is paid off.

2) Consequences of Mortgage or Deed of Trust

First, there is equity of redemption, where at any time up to the foreclosure sale, the debtor can redeem the property.

Redeeming the property can be done by:

Paying amount in arrears

Or paying entire amount if there is an acceleration clause

Also, equity of redemption cannot be waived in the mortgage or deed of trust, and any attempt to do so is called clogging. On the other hand, it can be waived later if a consideration is given.

Second, foreclosure must be made by public auction.

Third, when there are multiple mortgages, it is generally first in time, first in right, unless facts state recording act in deeds.

While priorities here can be changed by contract, purchase money mortgage take priority over all other mortgages even if others were recorded first.

And purchase money mortgage given by the seller has priority over purchase money mortgage given by a third party lender.

Third Party Lender Example: Bank.

Nevertheless, if the owner does anything to increase a senior mortgage, such as getting more money or increasing interest rates, then the senior mortgage loses its priority over junior ones to the extent of the change.

For Example, say the owner gives his first mortgage to Apple and Banana for \$100,000 and the second mortgage to Candy and Doughnut for \$50,000.

Then, the owner borrows an additional \$20,000 from Apple and Banana.

As a result, Apple and Banana have priority over the first \$100,000, Candy and Doughnut have second priority over the next \$50,000, and Apple and Banana have third priority over \$20,000. In Texas, mechanics and material man's lien have priority over mortgages or other liens.

The fourth consequence is wiping out.

Foreclosure on a mortgage wipes out all junior interests

Those interests, such as mortgages, easements, leases, and etc., that came after the mortgage being foreclosed on are wiped out. Junior interests must be made parties to a foreclosure action in order to be wiped out.

And junior interests do not wipe out the senior interests.

For Example, if Apple gets his first mortgage from First Bank, second mortgage from Second Bank, third mortgage from Third Bank, and fourth mortgage from Fourth Bank, and then Third Bank forecloses on its mortgage, then Fourth Bank's mortgage will be wiped out, but First and Second Banks' mortgages continue. However, Third Bank must join Fourth Bank as a party to the foreclosure action. If they do not, Fourth Bank's rights are not eliminated and they have rights to redeem or foreclose on the property.

Fifth, the proceeds of foreclosure sale should be used to:

Pay cost of foreclosure, including attorney's fees first.

Pay mortgage that was foreclosed, including interest.

Or pay off junior interest.

And anything left goes to the mortgagor or borrower.

Finally, the sixth consequence is deficiency.

If a mortgage is foreclosed and there is not enough money to pay off the mortgage, the mortgagee or lender can sue the debtor for balance.

3) Consequences of Installment Land Contract

It is under the forfeiture clause.

This clause says that if the debtor misses a payment, the seller can cancel the contract and keep all the money paid to date and gets property back is valid.

In Texas, the seller has to give the buyer detailed notice of a prospective forfeiture and buyers have a 60 day period to cure the default.

4) Transfer of Security Interest

A mortgagor or seller can transfer title to the property, and the mortgage tags along.

If the deed states that the buyer assumes the mortgage, the buyer is personally liable to lender for the mortgage.

However, under theory of exoneration, the seller is still liable as a surety, and if the buyer does not pay, the seller must pay. On the other hand, if the lender and buyer modify the mortgage, the seller is off the hook.

Differently, if the deed states that the buyer takes subject to the mortgage or if the deed makes no reference to the mortgage, the buyer is not personally liable to the lender for the mortgage.

Even though the lender cannot go after the buyer, if there is a default, the lender can still foreclose on the property.

The due on sale clause states that if the mortgagor transfers without the mortgagee's consent, the full amount of the loan is immediately due and payable are valid.

In contrast, a mortgagee or lender can transfer the note, and the mortgage tags along.

Here, the Holder in Due Course is not bound by payments made to the old mortgagee and can make the mortgagor pay again, even if the mortgagor did not know of the transfer.

5) Fixture Filing

Fixture Filing covers goods that are permanently attached to the land or real property.

If creditors do not file a fixture filing within 20 days after the chattel attaches, security interest in the chattel is junior to an earlier mortgage on the house.

Special Rights

1) Lateral & Subjacent Support

Generally, every landowner has right in the land of adjoining owners to lateral and subjacent support in his land in its natural condition.

Lateral support is support from the sides. It is strict liability if land is not supported. Here, the adjoining owner is liable for damage to the actual land itself.

Also, there is no recovery for damage to artificial structures or improvements, such as barns or a house on the land, unless the weight of the improvements did not cause the collapse, which means that the land would have collapsed even without the weight of the improvements.

On the other hand, subjacent support is support of the land from the bottom.

It is strict liability if land is not supported. A common scenario is where the holder of mineral rights removes minerals and the surface collapses.

It is also strict liability for artificial structures or improvements that were existing at the time the mineral rights were granted.

In contrast, if improvements were made after mineral rights were granted to someone else, there would be no liability for damage to those new improvements.

Now, if the excavator was negligent, the landowner can sue as well.

2) Crops

All crops pass with the sale or mortgage of the property, and the seller cannot enter and remove the crops unless the deed says he can.

3) Water Rights

There are generally three categories of water rights.

The first category is rivers and lakes.

The riparian, who is the landowner of rivers and lakes, also owns the land that borders a lake, river or stream.

The majority view is under the riparian rights doctrine.

Under the riparian rights doctrine, the owner can use all the water needed for his personal or domestic use. However, if it is not for personal use, the owner is limited to reasonable use.

As for the minority view, it is under the prior appropriation doctrine, where anyone, not just the riparian owner, who makes beneficial use of water has a right to continue using it.

The priority here is first in time.

The second category of water right is water from under the ground.

It covers percolating water, well water or ground water

The use must be reasonable. This means that the landowner is entitled to reasonable use of ground water, and the landowner must use it on the property and not export it elsewhere.

However, in Texas, the landowner's use does not have to be reasonable.

They can take all the water from a well on their property and neighbors, as long as they do not do it maliciously and do not waste the water.

Lastly, the third category is surface water.

Surface water covers runoff or flood water.

The natural flow approach is adopted in Texas.

Under the natural flow approach, courts allow reasonable steps to deal with flood water, and drainage pipes or ditches are valid if used reasonably.

On the other hand, under the common enemy approach, users can do anything with floodwater, whether reasonable or not.

Texas Homestead

1) General Rules

First of all, homestead is a place of business or residence protected against a creditor's claims.

Any family and any single adult can get homestead protection.

To have a homestead protection, a person must show intent to have that property as his homestead, and he must actually occupy it or take such acts of preparation that Court can conclude that he will occupy it.

In rural areas, homestead property is not limited by value but limited by size.

The limit for a family homestead property in a rural area is 200 acres, while the limit for a single person homestead property in a rural area is 100 acres.

In rural areas, homestead properties do not have to be contiguous.

On the other hand, the limit for homestead property in urban area is 10 acres, and it has to be contiguous.

Lastly, debts that can force a sale of homestead include unpaid taxes and those loans having something to do with buying, financing, or improving the property.

Trusts and Guardianships.

Formal Requirements of Trust

1) Definitions

One: The trustee holds legal title and has the burden of ownership.

And two: Beneficiaries hold equitable title and have the benefits of ownership.

2) General Rule

A trust forms when a settlor, also known as the grantor, delivers res to a trustee for the benefit of beneficiaries, with the intent to create a trust with a lawful purpose.

Here:

The settlor must have capacity for the trust to form.

There must be delivery of the subject matter with intent to convey legal title to the trustee.

And the corpus, the principal, the subject matter of the trust, must be certain and identifiable.

The trustee, whom the res is delivered to, must have legal capacity to contract and execute a deed. Individuals must post a fiduciary bond, and a trust never fails for a lack of trustee. To have legal capacity, the trustee has to be over 18.

Also, an unincorporated association cannot be a trustee. Only banks and trust companies given trust powers in their charters and charities, as to charitable trusts, can serve as trustees. No one can be compelled to accept fiduciary responsibilities and duties, but the trustee must owe fiduciary duties to someone. Also, the trustee can accept by signature or by conduct.

If the named trustee has no powers or active duties to perform, then no trust arises.

A trustee may resign from serving as trustee by:

Obtaining court approval upon a showing that he can no longer appropriately serve as trustee,
And making an accounting to the court.

Here, an accounting includes:

Property initially received,

Receipts and disbursements,

And property now on hand and liabilities.

As mentioned above, the res is delivered for the benefit of beneficiaries, thus let's look at beneficiaries.

Private or noncharitable trust has definite and ascertainable beneficiaries, and their interest must vest.

However, the interest may not vest as a result of Rule Against Perpetuities, which means that no interest is good unless it vests no later than 21 years after some death of last identifiable individual living at the time the interest was created.

The purpose of this rule is to limit the duration of private trusts and to place a check on attempts to tie up property through the creation of perpetual trusts.

However, this rule does not apply to charities.

Furthermore, a resulting trust is not a trust. Instead, it is an equity remedy courts employ when a trust fails for some reason, and the trustee then holds money for the benefit of whoever takes.

Example: Money from a residuary estate.

Parole evidence is not admissible to identify beneficiaries.

Next, to show the intent to create a trust, the language must impose enforceable obligations that are not merely precatory.

This means that language cannot be non-binding.

Precatory language include words and phrases such as:

Wish and desire

Request

Hope

I would like

Again, these are not enough to create a trust.

On the other hand, the language does not need to have trust or trustee. The concern here is a question of intent. Words should indicate that the res is used for the benefit of another.

On Exam: There must be a lawful purpose to create a trust. The purpose is usually unlawful where there is a condition that is against the public policy.

Lastly, trusts must usually be in writing.

Except, a transfer of personal property, such as stocks and bonds, to the trustee, other than the settlor or beneficiary trustee, coupled with a declaration of intent to create a trust simultaneously with or prior to the transfer, does not need writing. Nevertheless, a trust for land must be in writing.

Revocable Trusts and Other Arrangements

1) General Rule

All trusts are revocable and amendable by the settlor unless he expressly made it irrevocable and unamendable. Any revocation or amendment must be in writing, even if it is done to an oral trust of personal property.

If the settlor becomes incapacitated, only Court can revoke the trust. Here, not even a guardian can revoke the trust.

2) Amendments to Trust

No witnesses are needed. Amendments only need to be in writing. Also, trust law controls, not wills law.

3) Unfunded Revocable Life Insurance Trust

When there is an unfunded revocable life insurance trust that names the trustee as the trustee beneficiary, by statute, the payment of such employee death benefits or life insurance go to either the trustee of inter vivos trust or the trustee named in a will.

4) Pour-Over Will

Pour-over will is a testamentary device that, when the writer of a will creates a trust, he decrees in the will that the property in his estate at the time of his death should be placed in the trust.

It is valid even if trust is subject to revocation and amendment, and it is also valid even if it is unfunded trust. To have the pour-over will, the trust does not need to be in existence before or executed concurrently with the will and can be created after the will is signed.

5) Joint Bank Accounts

When there are Joint Bank Accounts, there must be an explicit language of right of survivorship.

Also, the signature card controls, and no extrinsic evidence is allowed to rebut.

If the parties to the joint account wish to create a right of survivorship, they must use the required statutory language:

With right of survivorship

Or on the death of one party, all sums in the account shall vest in and belong to the surviving party.

The right of survivorship language in a joint account is valid if the signature card was signed by the party who died, even if the survivor did not sign.

If the joint bank account was between a husband and wife and funded with community property, then both spouses must sign the signature card.

6) Durable Power of Attorney

Lastly, the Durable Power of Attorney must be signed and acknowledged before a notary, and it authorizes another person to act on behalf of the principal.

An agent's authority is not affected by principal incapacity if it says so.

There are three facts about the durable power of attorney:

One: The principal can grant a springing durable power of attorney that becomes effective upon disability or incapacity.

Two: Third parties that act in reliance of durable power of attorney are protected, and it is terminated upon spouses divorcing, not upon bankruptcy.
And three: Appointment of a guardian of the estate, in probate, terminates the durable power of attorney.

Charitable and Honorary Trust

1) General Rules

Charitable trusts are not subject to Rule Against Perpetuities, and it may be perpetual.

They must have a charitable purpose and confer a substantial amount of social benefit.

They also must be in favor of a reasonably large segment of public at large, and cannot benefit only limited identifiable individuals.

2) Doctrine of Cy Pres

When a specific charitable purpose can no longer be accomplished, a charitable trust's purpose may be reformed by judicial proceedings under the doctrine of cy pres. However, this cannot be done by a trustee.

If a will or trust violates the Rule Against Perpetuities, the instrument should be reformed or construed so as to carry out the settlor's general intent as far as possible.

This reform of specific direction or general charitable intent through Cy Pres type construction applies only to charitable trusts.

Now, if a charitable trust is challenged, a certified copy of the petition must be sent to the attorney general. But if it is not, the judgment is voidable by the attorney general.

Only the attorney general can enforce a trust, and if the named charitable beneficiary under a trust ceases to exist, the trustee can name a new charity as beneficiary without any court proceedings.

3) Honorary Trust Gift

Lastly, the Honorary Trust Gift is a type of gift in which an animal or object is the beneficiary.

Cats, castles and cars cannot file lawsuits, because to be a trust, the trustee must owe enforceable duties to a person.

Animals or objects do not qualify.

A gift of income to be paid for the care of a cat is an honorary trust gift.

Here, the trustee is on his honor to perform. If he does not, it fails and there is a resulting trust in favor of the residuary estate or beneficiary.

Resulting and Constructive Trust

1) Trust Code

First, Trust Code does not apply to either resulting or constructive trust.

2) Resulting Trust

Second, the Resulting Trust is the creation of an implied trust by operation of law, as where property gets transferred to one who pays nothing for it, and then is implied to have held the property for benefit of another person.

The purchase money resulting trust is where the buyer pays for land but gets it in another person's name.

The purchase money resulting trust presumption can compel re-conveyance at any time.

Here, evidence is admissible to show whether the land is in another's name as a gift or a loan of purchase price.

3) Constructive Trust

Third, Constructive Trust is not a trust. It is an equitable remedy whose objective is to disgorge unjust enrichment from a defendant's wrongful conduct.

It also enables an injured party to recover the property in dispute.

4) Primary Beneficiary Kills Insured

And lastly, when the primary beneficiary kills the insured under a life insurance contract, by statute, proceeds are distributed as though the killer predeceased the insured victim.

If no alternative beneficiary is named, then the proceeds go to the insured's estate.

Anti-lapse does not apply in life insurance because it is not a will.

Creditor Rights and Spendthrift Trusts

1) Spendthrift Clause

First, the Spendthrift Clause is given full effect in Texas. With spendthrift clause, a judgment creditor cannot reach the beneficiary's interest by garnishment or attachment.

Spendthrift clause protects a beneficiary's interest from creditors by prohibiting voluntary assignment or involuntary transfer of his interest.

Also, the trust must be irrevocable in type.

However, the following items can still be reached by the creditors.

Contracts for necessities, including creditors for medical, food, or rent.

Child support obligations.

Any interest retained by the settlor because the trust is a revocable trust.

And federal tax liens: The quote "this shall be a spendthrift trust" is valid because the Trust Code so provides.

2) After Income Distributed

It is no longer subject to the trust or its spendthrift clause. However, a creditor would have to file a suit every time he tries to reach distributed income.

The spendthrift clause removes a creditor's efficient remedies.

3) Fraudulent Transfers

Any time when the transfer is made with intent to defeat, delay, or defraud creditors, the principal can be reached.

4) Support Trust

The trustee provides for the beneficiary's necessities.

The creditor who furnishes necessities can reach the principal of a support trust.

Basically, if the beneficiary could compel a distribution, then the creditor can get to it.

Trust Administration Issues

1) Jurisdiction

District courts and probate courts have jurisdiction over inter vivos trusts, and statutory probate courts have exclusive jurisdiction over testamentary trusts.

2) Venue

The venue of an individual trustee is either:

The county of his residence,

Or the county in which the principal office of trust has been maintained.

When there are two or more trustees, the venue is at the county of situs where the trust has been maintained.

3) Accounting

Trust beneficiaries have the right to get an accounting on demand, although no sooner than 12 months after the trust was created.

The same applies to successive accountings on demand at the same intervals.

4) Texas Trustee Power Act

Texas Trustee Power Act dictates that a Texas trustee has the same power as a fee simple owner except when the trustee self deals or makes imprudent investment.

Also under the Texas Trustee Power Act, the trustee cannot:

One: Borrow trust funds.

Two: Buy or sell assets to himself.

Three: Loan funds to the trust. Any interest earned must be returned.

Four: Profit from serving as the trustee, because the trustee can only be compensated.

Five: Buy its own stock as trust asset when the trustee is a corporation.

Or six: Commingle funds. The trustee must segregate trust funds because there is a duty to earmark trust assets.

In addition to action for removal, beneficiaries have the following options when a trustee breaches the trust:

Beneficiaries can ratify the transaction and waive the breach.

Beneficiaries can sue for the resulting loss. If the trustee breaches by self-dealing, then it is strict liability.

Or beneficiaries can petition for imposition of constructive trust.

If the investment trustee made during breach went up in value, beneficiaries can trace the profits.

5) Self Dealing by Trustee

The fifth trust administration issue is that the statute of limitations for a breach of the trustee's fiduciary duty is 4 years, and it does not run until trustee:

Repudiates the trust,

Dies or resigns,

Or gives an accounting with full disclosure of facts upon which cause of action is based.

6) Bona Fide Purchasers

Bona fide purchasers are protected if they buy from the trustee without knowledge.

A beneficiary cannot sue a bona fide purchaser because a bona fide purchaser cuts off equitable title unless the bona fide purchaser was the fiduciary's relative.

7) Trustee's Loan to Beneficiary

When there is self dealing by a trustee, the self dealing rules apply to:

Loans or sales to a relative

And to a business entity of which trustee is an officer, director, partner, employee or principal shareholder.

8) Suit On Behalf of Minor Beneficiary

Trustee can loan to a beneficiary, but it is also subject to the general test of prudence, which means the trustee has to act like a reasonable prudent person.

9) Multiple Trustees

When there is a suit on behalf of a minor beneficiary, only the minor's guardian or personal representative may bring action to challenge a trustee's alleged breach of duty, not his parents.

10) Uniform Prudent Investor

When there are multiple trustees, and one believes the others are breaching their duty, majority rules.

However, each co-trustee has duty to prevent a breach by not participating in the transaction and giving express dissent in writing.

11) Uniform Prudent Investor Act

The trustee should invest for total return, taking into account the appreciation and capital gain, as well as ordinary income. Prudence is measured by conduct at the time investment decision is made, not by the hindsight based on outcome or performance.

The Uniform Prudent Investor Act investment strategy must establish and maintain a custom tailored investment strategy that will effectuate the settlor's intent as to the purposes of the particular trust, taking into account such factors as:
One: The role that each investment plays within the overall trust portfolio.

Two: The expected total return from income and capital gain.

Three: General economic conditions.

Four: Possible effect of inflation or deflation.

Five: Expected tax consequences of investment decisions or strategies

Six: Needs for liquidity.

Seven: An asset's special relationship or value to the purposes of the trust or a beneficiary.

And eight: Any differing interests of the income beneficiaries and the remaindermen.

12) Uniform Principle & Income Act

A trustee can exercise adjustment power in favor of income beneficiary where appropriate, and he can allocate capital gains to income.

There are factors to be considered in exercising adjustment power, such as the power to adjust total return between income and principal, and allocate capital gain to income.

These factors are:

One: Intent of the settlor as to respective interests of the beneficiaries.

Two: Net amount of ordinary income and capital gain available for allocation.

Three: Any increase or decrease in value of the trust assets.

Four: Whether the trust gives the trustee a power to distribute principal.

Five: Purpose and expected duration of the trust.

Six: Circumstances of the beneficiaries.

Seven: Need for liquidity, regularity of income, and preservation and appreciation of capital.

And eight: Effect of economic conditions and effects of inflation and deflation.

Furthermore, under the Uniform Principle and Income Act, allocation is deemed to be equitable if allocation follows the federal income tax depletion allowance.

13) Expenses

For the trustee's commissions, expenses for accounting, and judicial proceedings, half is charged against income, while the other half is charged against principal.

Ordinary expenses are charged against income. These include Property taxes, casualty insurance payments, ordinary repairs, and mortgage interest payments.

And capital expenditures are charged against principal, which include capital improvements, expenses relating to environmental matters, estate taxes, and mortgage principal payments.

14) Delegation of Investment

A trustee may delegate but should exercise due care in selection.

15) Provisions of Texas Trust Code

All provisions of Texas Trust Code are default rules, where Texas Trust Code should be applied absent contrary provision by the settlor, the settlor cannot authorize a corporate trustee to: Buy or sell assets to itself, Or borrow trust funds.

16) Trustee Personal Liability

A trustee is not personally liable on a contract unless he fails to disclose his representative capacity.

However, a trustee is liable for torts committed by himself or his agents. Here, the trustee is entitled to reimbursement if his act is within the scope of representation and incident to proper business acts.

In addition, the lawsuit must name the trustee and not the trust. Also, exculpatory clauses will relieve a trustee from negligence, but the clause are strictly construed and read narrowly.

17) Suing Third Party That Inures Trust

A beneficiary cannot sue the third party that inures trust, because generally, the trustee holds legal title and is the one who should sue unless the trustee is unable or unwilling to sue or the third party participated with the trustee in committing the breach of trust.

Judicial Modification and Termination of Trusts

1) Trust Termination

First, a trust can be terminated automatically, according to its terms.

Second, a trust can be terminated on petition of the trustee or beneficiary, if the court finds that:

Purposes of the trust or any provision have been fulfilled or have become illegal or impossible to fulfill

Or there are circumstances not known or anticipated by the settlor, where compliance with trust terms would defeat or substantially impair accomplishment of trust purposes.

When there are unanticipated circumstances, modification or early termination must be done by Court after hearing. This means that there cannot be extra-judicial agreement by parties.

Nevertheless, for tax purposes, division of 1 into 2 trusts or merger of 2 into 1 trust outside of court is valid.

In Texas, spendthrift clause is only one of the factors for the trustee to consider whether a trust should be terminated due to changed circumstances.

2) After Termination

The trustee may continue to exercise trust powers for a reasonable time needed to:

Wind-up trust affairs,

And make distributions to the beneficiaries.

Guardianship Administration

1) Guardian of Person

The Guardian of a Person has the right to physical possession of the ward, duty of care control and possession, duty to provide clothing, food, medical care and shelter, and power to consent to medical and psychiatric treatment.

The guardian of person can be named in a will and no bond is required.

2) Guardian of Estate

The Guardian of an Estate, on the other hand, has the right and duty to manage the ward's property, enforce the ward's obligations, and bring or defend suits by or against the ward. Generally, parents have no authority to deal with their child's property. They must get appointed as the guardian of the estate. Except, if the value of the child's entire interest in all of the property inherited is less than \$100,000, then a parent, managing conservator, or guardian of person can obtain a court order authorizing a sale of stock without the appointment of a guardian of the estate.

In this case, sale proceeds are paid into the court registry and handled by Court.

Opposite to the guardian of person, the guardian of estate cannot be named in a will and a bond is required.

3) Appointment of Guardian

Generally, the surviving parent may, by a will or written declaration, appoint a guardian of his minor child or incapacitated adult child in the event of the parent's subsequent death or incapacity.

The named person must be appointed guardian unless Court finds that he is disqualified, dead, or would not serve in child's best interest.

For a written declaration, execution requirements are the same as for wills:

Also, a written declaration can be wholly in parent's handwriting and signed by the parent.

And if not, written declaration must be signed by the parent or on his behalf by another person at the parent's direction and in his presence and must be witnessed by 2 witnesses who are 14 or older.

Nevertheless, a parent can waive the fiduciary bond requirement in the will for someone serving as the guardian of the person, but he cannot waive the fiduciary bond requirement in the will for someone serving as the guardian of estate.

Now, if neither parent named a guardian, children age 12 or older can choose their guardian in a writing filed with Court unless Court vetoes as it is not in the child's best interest.

4) Eligibility of Guardian

To be eligible as an appointed guardian of the person and estate of a minor, a person has to be the parent. Of course, the last surviving parent can name guardian of their child.

It is presumed that a person designated by a parent is in the child's best interest, but this presumption is not conclusive.

To be eligible as an appointed guardian of the person and estate of an incapacitated adult, a person has to be either named by the last surviving parent in a will or other written declaration, or a competent adult may designate a guardian by a written declaration to serve as his guardian of the person or estate if he becomes incapacitated.

If no such declaration exists, then either the spouse or the next of kin in the nearest degree of kinship is eligible.

Also, 2 persons cannot be appointed co-guardians except for husband and wife.

5) Disqualifying Guardian

And even if the guardian is eligible, he can be disqualified from being appointed guardian due to the following reasons:

There is a conflict of interest:

He becomes incapacitated.

If he is inexperienced, has lack of education, or is incapable of prudently managing an estate for other reasons.

He is expressly disqualified in the designation of guardian before the need arises.

Or he is convicted of sexual offense, sexual assault, injury to a child or elderly person.

Now, there is presumed conflict of interest when the guardian owes money to the ward or is asserting claim against proposed ward unless:

Court determines there is no conflict,

Or a guardian ad litem is appointed to represent proposed ward.

6) Incapacitated Persons

There is limited guardianship for incapacitated adults.

Probate Code urges Court to order limited guardianships so that the ward does not lose all legal and civil rights.

The order appointing a guardian must specify:

One: The powers, duties, and limitations of the guardian,

And two: The amount of the ward's funds that can be expended for the ward's care without court approval.

And if the ward regains some of his cognitive skills, the ward or an interested person can petition to have the guardianship modified or terminated.

There are some safeguards in an incapacity proceeding to insure that the ward's rights are protected include:

There is a mandatory appointment of attorney ad litem and court investigator.

There is a discretionary appointment of guardian ad litem and court visitor.

The ward must be present at the trial, unless the court determines appearance is not necessary.

And the proposed ward can ask for a jury trial, which is mandatory upon motion.

The evidentiary standard as to whether the proposed ward is incapacitated is clear and convincing evidence. All other findings are by a preponderance of the evidence.

7) Timelines

If a guardian is appointed, then the letters of guardianship are valid for 16 months.

Also, there are some actions the guardian needs to take within 60 days after appointment. The guardian needs to:

Be qualified by taking oath and posting fiduciary bond within 20 days.

Publish notice of administration in newspaper of general circulations within 1 month.

File inventory of the estate within 30 days.

And file an application of monthly allowance to be expended from income and principal on the ward's behalf, stating separate amounts requested for the ward's education and maintenance and the maintenance of wards property within 30 days.

8) Reimbursement of Guardian

For the guardian to be reimbursed for expenditures on the ward in excess of the court-approved monthly allowance, he needs to provide clear and convincing evidence that the expenditures were reasonable and proper.

9) Guardian Removal

Furthermore, to remove a guardian, the below requirements must be shown with clear and convincing evidence.

Court may remove a guardian without notice or hearing if the guardian:

Fails to qualify by giving oath and bond within 20 days or fails to file inventory within 30 days.

Moves from Texas, is absent from Texas for more than 3 months, cannot be served with notices or other processes because his whereabouts are unknown, or is evading service,

Or has treated the ward cruelly, has failed to maintain or educate the ward, has misapplied assets, or has removed assets from Texas.

Court may remove a guardian but only after notice or hearing if:

One: There are grounds to believe that he has cruelly treated the ward, has failed to educate or maintain the ward, has misapplied or embezzled assets, or has removed assets from the state,

Two: He is guilty of gross misconduct or mismanagement,

Three: He fails to comply with a court order or fails to file an accounting, both of which are required,

Or if he becomes incapacitated, is sentenced to the penitentiary, or for some other reason is incapable of properly performing the duties.

Again, there must be clear and convincing evidence to prove so.

10) Responsibilities of Guardian

First, the guardian has a duty to invest all funds and assets that are not immediately needed for the ward's education, maintenance, or support.

Second, the guardian must file application for an order either: Authorizing him to develop and implement an investment plan for estate assets,

Or modifying or eliminating the duty to invest within 180 days after appointment.

After an investment plan has been approved by Court, the guardian must manage and invest the estate as a prudent person would in managing his own affairs.

11) Guardian's Authority

There are 4 things a guardian can do without court order or approval:

One: He can retain property received at inception of the guardianship or thereafter acquired by gift, will, or inheritance, with no duty to diversify, and with no liability for any resulting depreciation or loss for a period of 1 year.

Two: He may make investment decisions that are consistent with the investment plan approved by Court.

Three: When obtaining court approval is not convenient or possible, the guardian may expend amounts in excess of monthly allowance fixed by Court, if there is clear and convincing evidence that the expenditures were reasonable and proper.

And four: Guardian can insure property, pay taxes, pay court costs, pay bond premiums, get release lien on payment of debt, vote stocks, pay calls and assessments on investments.

Now, the sale of real or personal property of the guardianship estate, which always requires court approval, can be made only for purpose of:

Pay claims and expenses.

Ward's maintenance.

And dispose of unproductive property.

12) Guardian Compensation

Some restrictions are given to guardians' compensation.

The compensation of a guardian of person cannot exceed 5% of the ward's gross income.

The guardian of estate is entitled to a reasonable compensation of 5% of the ward's gross income plus 5% of all money paid out of the estate is considered reasonable if the guardian has taken care of and properly managed the ward's estate.

13) Governmental Benefits

If an incapacitated adult has such a small estate that no guardianship is necessary but receives a pension that cannot be paid to anyone other than a guardian of the estate, then the guardian of person can be appointed guardian to receive funds from governmental source and can expend the pension payment on ward's behalf without court approval if the amount is \$12,000 per year or less.

14) Power to Make Tax Motivating Gifts

General rule: Court may authorize the establishment of an estate plan of the purpose of minimizing income, estate, or other taxes if it is shown that the ward will probably remain incapacitated during his lifetime.

Court can also approve a charitable gift out of income if:

The gift will qualify for an income charitable deduction,

Net income from estate will probably exceed \$25,000,

And the gift will probably not exceed 20% of ward's net income for the year.

15) Jurisdiction of Probate Court

The general rule is that the Probate court is the proper place to raise issues when the issues are incident to the guardianship estate.

For Example, the husband is incapacitated, and the wife, who was the guardian, resigns as guardian and files for divorce, which raises issues about child custody and child support.

And there are different rules of venue.

The venue for appointment for guardian of minor is at the county where the parents, or parent who is managing conservator, reside.

The venue for the guardian of an incapacitated adult is the county where the proposed ward resides or the county where principal estate is located.

And the venue for the appointment of guardian named in a parent's will is the county where the will was probated or the county where the appointee resides.

16) Standing

To have standing to file a will contest, a person must have an economic interest adversely affected by the will's admission to probate.

And any person has standing to commence a guardianship proceeding. If the person does bring a proceeding but is unsuccessful, then he is entitled to recover attorney fees from the proposed ward's estate if he acted in good faith.

Commerical Paper.

2 Types of Negotiable Instruments

1) Promissory Notes

Promissory notes is a contract where one party, the maker or issuer, makes an unconditional promise in writing to pay a sum of money to the other, the payee, either at a fixed, determinable future time, or on demand, under specific terms. The maker is the person promising to pay, while the payee is the person entitled to payment.

2) Drafts

The second type of negotiable instrument is Drafts, commonly known as checks.

The parties to a draft include:

The drawer, who is the person ordering payment such as the writer of a check.

The drawee or payor, which is the person or institution, such as a bank, ordered to pay the money.

And the payee is the person entitled to payment

There are different types of checks.

One: Ordinary check. It is any draft drawn on a bank and is payable on demand.

Two: Certified check. It is an ordinary check that the bank agrees in advance that it will pay when presented.

Three: Cashier's check, where the drawer and drawee are the same, and the person who buys a cashier's check intending to transfer it to another to pay a debt is called a remitter.

Four: Teller's check, which is drawn by one bank on another bank.

And five: Traveler's check, which requires a counter signature by person whose signature already appears on the check.

Negotiability

1) General Rule

A negotiable instrument must be negotiable, and the negotiability is determined at the time of issuance.

2) Negotiable Instrument

It is a writing that is signed by the maker or drawer and contains an unconditional promise or order to pay a fixed amount of money, with no other undertaking or instruction. This fixed amount of money is payable on demand or at a definite time.

Breaking this definition down, a negotiable instrument must be in writing but it does not matter what it is written on or with. It must be signed by the maker or drawer. The signature can be any mark or symbol made with the intent to authenticate the writing. It can also be an authorized agent's signature, trade name, or assumed name.

The instrument contains an unconditional promise or order to pay. This means that a negotiable instrument cannot:

One: Make payment subject to an express condition. Therefore, statements such as "if and only if" something happened and "provided however" are not valid in a negotiable instrument.

Two: Use phrases "subject to" or "governed by."

Or three: Incorporate the terms of any agreement except that the instrument can incorporate another document referring to rights regarding collateral, prepayment, and acceleration.

On the other hand, a negotiable instrument can:

Contain details or consideration of underlying contract.

Contain a reference to another writing. Therefore, phrases like "as per" or "in accordance with" another writing is valid.

Refer a particular fund or source where the payment will come from.

And use consumer protection language that is not Holder in Due Course.

Moving on to the fixed amount in a negotiable instrument. Only the principal has to be fixed, while the interest can be a variable.

It also does not matter how the interest is calculated. If the note provides for interest but is silent as to the amount, the interest is at the judgment rate.

Furthermore, money is the medium of exchange authorized or adopted by a domestic or foreign government as part of its currency. It cannot be payable in goods or services.

If words and figures do not match, the words will prevail.

A negotiable instrument must also contain no other undertaking or instruction. This means that it cannot state any other promise or undertaking by the maker or drawer.

For Example, "a promise to pay \$500 and deliver goods" is nonnegotiable.

In contrast, the instrument can:

Make promises concerning collateral.

Contain confession of judgment clauses.

And waive state rights that protect the maker or drawer.

The amount is payable on demand or at a definite time.

To differentiate the timing, an instrument is on demand if it:

States that it is payable on demand or at sight,

Does not state a date,

Or is a check.

And it is payable at a definite time if it states that it is payable:

On elapse of a definite period of time after sight or acceptance,

At a date stated in the instrument,

Or at a time readily ascertainable at the time the promise or order is issued.

Furthermore, a negotiable instrument can include prepayment or acceleration.

Example of Acceleration: "payable on November 8, 2010, but the holder may demand payment at any time prior thereto if he deems himself insecure".

A negotiable instrument can include extension options. Here, if the holder has the option to extend payment obligation, and the instrument does not have to state a time limit.

However, if the maker or drawer has the option to extend payment obligation, then the instrument needs to state a definite time limit.

Extension Statement Example: "Payable on November 8, 2010, but if my crop fails that year, then I should have until November 8th of the following year".

Next, the general rule for the words of negotiability is that only notes require words of negotiability, which could be payable either to bearer or order.

For the word "bearer", it could be:

Payable to bearer or to the order of bearer.

Payable to cash or to the order of cash.

Blank.

Not payable to an identified person.

For Example, "payable to Merry Christmas".

Or payable to both bearer and order.

For Example, "to order of Apple Smith or bearer".

Also, a negotiable instrument that is notes must have the word order on the instrument. This includes:

Payable to order of an identified person, such as payable to order of Joe.

Payable to an identified person or order, such as payable to Apple Smith or order.

Payable to the order of an estate.

For Example, "pay to order of Apple Smith's estate".

And payable to the order of a person holding official office.

3) Destroying Negotiability

Negotiability is destroyed if it does not meet all elements.

Example: A note stating that it is payable to Apple Smith is not negotiable because it does not contain words of negotiability.

It is not bearer or order paper.

Negotiability can also be destroyed with a bold statement on the note that it is non-negotiable.

Now, a check is still negotiable even though it does not contain words of negotiability, as long as it meets all other requirements listed above. This means that the statement payable to Apple Smith is negotiable even though it does not contain words of negotiability.

This also means that the negotiability of a check cannot be destroyed by:

Scratching out the words to the order

Or writing non-negotiable on it.

Negotiation

1) General Rule

The General Rule is that for an instrument to be negotiated, the instrument will be transferred to a third party who becomes a holder.

2) Holder Status

A person needs to be a holder to sue on an instrument. This means he must have Holder Status.

A person is the holder of bearer paper if he has possession of the instrument, whereas he is the holder of order paper if he has both the possession and proper endorsements.

Proper means that endorsements are not forged.

Moreover, a person or an institution cannot be a holder if:

It is a drawee bank.

Or he is a person receiving instrument that has been forged.

3) Endorsement

One: The blank endorsement.

A signature not accompanied by the naming of a specific endorsee creates bearer paper which may then be negotiated by delivery alone.

And if the payee endorses the back and does not name a new payee, it converts the instrument into bearer paper, and any person, including a thief, just needs possession to be the holder.

However, the holder can convert it into order paper by writing the name of a new payee above the last endorsement.

Two: Special endorsement.

Here, the payee endorses the back and then specifies a new payee above his endorsement. It is order paper even if special endorsement does not contain order language.

Three: Restrictive endorsements.

Writing phrases such as "for deposit only" or "for collection only" makes it a restrictive endorsement and depository bank has to comply with it or will be liable for conversion.

Four: Possession without endorsement.

If there is no endorsement, then it is not a negotiation and the transferee is not a holder.

However, if a value is given, the transferee has a right to get the transferor's endorsement and will become a holder when he finally gets the endorsement.

In a depository bank, if the bank's customer is a holder and deposits instrument in the bank, the bank becomes a holder even if it is not endorsed.

Five: Misspelled name.

If the payee's name is misspelled, the instrument can be endorsed in either his correct name, the misspelled name, or in both, and the person taking the instrument may require signature in both names.

Six: Persons with the same name.

If the payee's name is confusing because there are more than 1 person with the same name, then the intent of the issuer determines who is entitled to the instrument.

And seven: Instrument may be payable to 2 or more persons.

In cases of to Apple or Banana, either of them can sign.

In cases of to Apple and Banana, both of them must sign.

And in cases of to Apple, comma, Banana, either of them can sign.

Now, the endorsement must be on the instrument or on a separate document affixed to the instrument.

Also, an endorsement is valid even if the payee lacks capacity.

Examples of Payee Lacking Capacity: The payee is a minor or if the payee is under duress.

4) Forged Endorsements

Generally, only forgery of order paper affects negotiability. Forgery of bearer paper does not matter. If there is a forgery of the payee's or special endorsee's name, then no later transferee can qualify as a holder or holder in due course, because there is no valid negotiation. As for claims to the instruments, if the payee's name is forged, the payee is entitled to recover the instrument.

Holder in Due Course

1) Definition

To be a holder in due course, the holder needs to satisfy certain requirements, and these requirements need to be met at the point value is given.

Things that happen after do not destroy the holder in due course status once the status is achieved.

For Example, any notice of problems given after the holder has already achieved the holder in due course status will not.

In summary, the holder in due course will take free of any personal defenses.

Personal defense include:

Mistake

Unauthorized completion

Condition precedent

Fraud in inducement

And lack of consideration

However, a holder in due course will not take the negotiable instrument free of any real defenses.

Real defense include:

Fraud in factum

Illegality

Bankruptcy

Duress

Lack of capacity

Statute of limitations

Forgery

Unauthorized signature

And material alteration

2) Ineligible Parties

Certain parties cannot be holder in due course.

They include:

One: The original payee. Only subsequent transferees can be a holder in due course.

Two: The drawee bank. It does not get the check through negotiation, it gets negotiation through a presentment.

And three: Subsequent transferees of forged order papers.

3) HDC Requirements

The holder in due course is a holder who takes for value, in good faith, with no notice of defects, and the negotiable instrument is properly negotiated to him or he is protected by the shelter rule.

A person is not a holder:

If the order paper was forged.

Or if he is a drawee bank or original payee.

The authenticity is not questionable if the instrument does not contain the evidence of forgery, alteration, or incomplete so as to raise suspicions.

The holder in due course can give the value for the instrument in the following ways:

One: The holder in due course can pay less than the face value of the instrument, unless it is excessive.

Here, the note with the face value of \$5,000 can be discounted for \$4,800.

If the holder paid the full \$4,800, then he has given the value for \$5,000.

And if the holder paid \$2,400, then he has given value for \$2,500.

Two: The holder can make a promise and perform that promise.

Three: The holder can make an irrevocable obligation to perform the promise.

And four: The value can be based on the past consideration or debt.

The holder in due course must take for value in good faith. Good faith means that the holder must act with honesty in fact and in the observance of reasonable commercial standards for fair dealing.

For Example, there should be no steep discounts.

A holder must also take without notice of defect at the time value was given.

The kinds of notice include:

One: Actual knowledge, where holder has to actually know about the instrument defect of any sort, and instrument's merely being filed in the public records is not enough.

Two: Receipt of notice,

And three: Circumstances where the holder should have known the defect.

The common defects of instrument that will consist a notice are:

One: Instrument that is overdue.

In general, checks are overdue 90 days after issuance.

The holder only has notice if the principal is overdue.

And the instrument is not overdue if only the interest is overdue.

Two: Instrument is dishonored, where the demand was made and payment was refused.

Three: Unauthorized signature.

Four: Alteration.

Five: Any claim against the instrument.

And six: Any defense or claim for recoupment.

Again, these six are common defects of an instrument with notice. On the failure to endorse, if there is no endorsement of order paper, the transferee is not a holder. However, if the transferee gave value, he has the right to obtain an endorsement. If the transferee receives notice of problems before the endorsement is made, he cannot be a holder in due course because he is not a holder until it is endorsed, and by then he already has notice of the problems.

4) Shelter Rule

Under the Shelter Rule, a transferee who takes an instrument from a holder in due course derivatively takes holder in due course rights even if they do not meet the holder in due course requirements.

5) HDC Rights

The transferee does not actually become a holder in due course. He just has the holder in due course rights.

Nevertheless, the transferee cannot get holder in due course rights if he engaged in fraud or illegality affecting the instrument.

Also, the person who acquires an instrument by fraud or illegally cannot become a holder in due course by passing the instrument onto a holder in due course and repurchasing it.

Lastly, here are the Rights of a Holder in Due Course.

First, a holder in due course is only subject to real defenses.

Real defenses include:

One: The obligor is a minor and cannot enter into contracts.

Two: The obligor was under duress.

Three: The obligor has lack of legal capacity.

Four: There is illegality making obligation void.

Five: There is fraud in the factum:

In a fraud in the factum, the signer lacked knowledge of the instrument's character or essential terms, and the signer lacked reasonable opportunity to learn of the instrument's character or essential terms.

The sixth real defense is the discharge of the obligor in bankruptcy.

Seven: Alteration.

And eight: Forgeries.

The second right is that a holder in due course is protected from personal defenses, which are any defenses other than a real defense.

And third, a holder in due course is free from claims to the instrument. This means neither the maker nor drawer can seek to recover the physical note or check from the holder in due course.

Liability of Parties

1) Agent's Signature

First, a signature by an agent can give the principal or agent liability.

If an agent is authorized to sign and signs an instrument by either signing their name or the name of the principal, the principal is liable.

However, if the agent's signature is not authorized, the agent is personally liable, but the principal is not.

The agent is not personally liable for a promissory note if:

The principal is identified in the instrument,

And the signature unambiguously shows that the person is signing as an agent.

Example Cases:

"ABC Corporation, Apple Smith, the President": Clear that Apple Smith is an agent for ABC Corporation.

"ABC Corporation, by Apple Smith": Clear that Apple Smith is an agent for ABC Corporation.

"ABC Corporation, Apple Smith": No agent status is indicated, and Apple Smith may be personally liable.

Moving on, the agent is then liable to any holder in due course unless the holder in due course had notice that the agent was not intended to be liable.

And the agent is also liable to any non-holder unless he proves that the original parties did not intend for the agent to be liable.

For checks, the agent is not personally liable if the principal's name appears on the check.

For Example, if it appears as "ABC Corporation, Apple Smith", then Apple Smith is not personally liable as an agent for ABC Corporation.

2) Maker

As the primary liability, a maker must pay the note when it is due according to the terms when it was issued or when an incomplete instrument is completed.

The holder can sue the maker without satisfying any conditions first.

Also, the maker is liable to the holder and any endorser who paid the instrument.

If 2 or more persons sign as co-makers, they are jointly and severally liable.

In cases of co-makers, a regular co-maker has a right of contribution from the other co-makers if he is forced to pay more than his share.

Example: Apple, Banana and Candy all sign a note as makers in return for a \$3,000 loan, and the holder collects all \$3,000 from Apple. In this case, Apple has a right of contribution for \$1,000 each from Banana and Candy.

Furthermore, an accommodation co-maker, signed as a surety for another co-maker, has right of reimbursement or contribution.

For Example:

Apple, Banana and Candy sign a note for \$3,000, and Apple signed as a surety. In other words Banana and Candy got all the loan money.

Then, the holder collects all \$3,000 from Apple.

In this case, Apple has a right of reimbursement and can collect full \$3,000 from Banana or Candy.

3) Drawer

A drawer cannot disclaim liability on a check, but he can disclaim liability on other drafts. An example of disclaiming liability on drafts is putting the phrase "without recourse" on a draft.

As a secondary liability, the drawer is liable only if a check was presented and dishonored.

A check must be presented to the drawee within 30 days.

Though the drawer is still liable even if he waited longer than 30 days, he has no liability if the drawee becomes insolvent.

The other condition is if the check was dishonored, which means that the drawee refuses to pay the instrument upon presentment. Now, the drawer's liability is discharged when the check is accepted by bank.

The drawer can limit his liability by writing on a check stating that the check is void after a certain number of days.

4) Endorser

Generally, an endorser is anyone, other than the maker or drawer, who puts their signature on an instrument.

A qualified endorsement can avoid endorser liability by writing "without recourse" by the endorser's name.

However, if the endorser has liability, he is liable to the holder of the check and any subsequent endorser who paid the check.

An endorser is liable under all of the following situations.

One: The presentment for payment to the maker or drawee,

Two: Dishonor by the maker or drawee,

And three: The endorser is given notice of the dishonor within 30 days.

Nevertheless, an endorser's liability is automatically discharged if the presentment is not made within 30 days or the check is accepted by a bank.

5) Drawee Bank

Generally, a drawee bank has no liability to a payee until the drawee signs the check.

If the drawee signs the check and has accepted it, then the primary liability incurs. This is the primary liability as the acceptor.

However, he does not have to accept the check and cannot be sued for failing to accept.

And if the bank accepts or certifies the check, the drawer and endorser's liability is discharged.

Now, final payment occurs either when the drawee bank pays the instrument in cash or does not revoke a provisional settlement by the midnight deadline. The midnight deadline refers to the midnight on the next banking day after the banking day of receipt.

Once the drawee bank pays a check, drawee bank cannot recover on the check from the persons it paid.

Regardless, the bank can still have a claim for breach of presentment warranty or go after its customer, such as the drawer.

If the payee's name is forged and the drawee bank pays it, the payee can sue a drawee for conversion.

Here, the payee must have received the delivery of the instrument to sue in conversion. If the instrument is lost or stolen from mail, the payee cannot sue.

At the death or incompetence of a customer, the bank can continue to pay until 10 days after they get notice of the death or incompetence.

But if someone with an interest in the account demands that the bank stop paying immediately, the bank must stop immediately.

6) Accommodation Party

An accommodation party is a surety who signs an instrument to lend his credit to another party but does not receive any direct benefit, such as money.

Parties are on notice that a person is acting as an accommodation party if:

There is the use of words such as guarantor or surety

Or it is an anomalous endorsement.

For Example, if he is a person who is not in the chain of title. This accommodation party may sign an instrument in any capacity and incur liability in that capacity.

If a party signs as an accommodation maker, then he has primary liability and the right to reimbursement from the accommodated party.

In contrast, if a party signs as an anomalous endorser, then he has secondary liability and the right of contribution from other anomalous endorsers or right of reimbursement from the accommodated party.

If the guarantor specifically guaranteed collection only, then he has to go after the accommodated party first unless such action would be useless because the accommodated party is either insolvent or cannot be found.

Warranty Liability

1) Disclaiming Warranties

The transferor cannot disclaim warranties in checks, but he can disclaim warranties in everything else.

2) 2 Types of Warranties

Transfer and presentment warranties.

Any transferor who receives consideration can make transfer warranties.

However, the drawee bank or maker of note cannot sue on a transfer warranty. They can only sue on presentment warranties. Transfer warranties are made to the immediate transferee and also to subsequent transferees if the transferor endorsed the instrument.

Transfer warranties warrant that:

The transferor is entitled to enforce the instrument.

All signatures are authentic and authorized.

There is no alteration.

There are no good defenses against the transferor.

There is no knowledge of any insolvency proceeding.

And that if a person demands draft, that person identified as drawer has authorized the instrument.

On the other hand, the presenter and previous transferors make presentment warranties, and the holder of the presentment warranties can sue anyone in the chain of title.

Also, presentment warranties are made to those who paid in good faith. They include:

The maker who pays in good faith.

The drawee who pays or accepts in good faith.

And the acceptor who accepts in good faith.

As for presentment warranties on checks, it warrants that:

One: The transferor is entitled to enforce the instrument, assuming that the transferor is the holder and there is no forged or missing endorsements.

Two: There is no alteration.

Three: Transferor has no knowledge that drawer's signature is forged or unauthorized.

And Four: Transferor is entitled to enforce the instrument.

Other Issues

1) Discharge by Holder

A holder can discharge an obligation by surrendering the instrument to the obligor, destroying it, or canceling it.

2) Effect on Underlying Obligation

If a negotiable instrument, such as a check or note, is accepted for an underlying obligation, the obligation is suspended.

After the suspension, if the negotiation instrument is then paid or accepted, then the obligation is discharged up to the amount of the payment.

On the other hand, if negotiation instrument is then dishonored, holder can sue on the instrument or on the underlying obligation. For Example, if the tenant delivers a rent check to landlord, then the tenant's rent obligation is suspended until the check is presented for payment to Tenant's bank.

If the bank pays the check, obligation is discharged, but if the bank refuses to pay, the landlord can sue on the check or on the underlying lease agreement.

Now, if the check is paid by the certified, cashiers or teller's check, then the underlying obligation is discharged as if paid in cash.

3) Failure to Produce Original Instrument

When there is a failure to produce an original instrument, there can be enforcement by a person not in possession.

This means that if the original instrument has been lost, destroyed or stolen, a person can still enforce the instrument if:

That person was in possession when the loss occurred,

Loss was not due to transfer or lawful seizure,

And that person cannot reasonably obtain the original instrument.

Here, the person enforcing the instrument is required to put up a security or bond.

4) Overdraft

A bank can charge a check against an account even though the charge creates an overdraft.

A customer is not liable for the amount of the overdraft if the customer neither signs it nor benefit from the proceeds of the check.

5) Postdated Check

A bank can pay a postdated check before the post date unless the customer gives notice to the bank of the postdating which describes the check with reasonable certainty.

6) Stop Payment Orders

The drawer can make the stop payment.

A stop payment must be in writing, dated and signed, and the writing must describe the item with certainty. Also, a stop payment order is effective for 6 months and can be renewed

However, a drawer has no right to stop payment on cashiers, tellers, and certified checks. Here, a bank can stop payment, but it risks the liability for expenses, lost interest and consequential damages.

Defenses of the bank include:

One: The stop payment order did not comply with the requirements, although, in this case, the bank can stop the payment order if it wants to.

And two: The customer suffered no loss because he would have had to pay the check even if the payment were stopped.

For Example, the check has already reached the hands of the holder in due course.

If the bank pays a check that had a proper stop payment, it is liable for any losses incurred, including damages for dishonor of subsequent items and bank must re-credit account.

7) Wrongful Dishonor

It occurs when a bank dishonors a properly payable check.

Only the drawer can complain about wrongful dishonor, and the drawer can get any damages that resulted from the dishonor of the check.

There are two defense for the drawee bank:

One: The payment would overdraw the drawer's account.

And two: The check is more than 6 months old.

8) Payment in Full Check

It is a check on which the drawer conspicuously indicates that cashing the check acts as payment in full of an existing obligation.

Payment in full acts as an accord and satisfaction if the payee cashes the check.

Unless, the payee returns the money within 90 days,

Or the payee is an organization and had previously notified the drawer of a particular person or address to send payment in full checks.

In those cases, payment in full is not an accord and satisfaction, and the drawer is not discharged simply by the act of cashing the check.

Forgery and Alteration

1) Application

Different rules apply based on the identity of the person whose name is forged.

2) Forgery of Maker's Signature

First, when there is a Forgery of the Maker's Signature, the alleged maker is not liable because a maker's signature does not appear on a note.

However, the forger is liable because his signature is the one that appear on a note.

3) Forgery of Drawer's Name

Second, when there is a Forgery of the Drawer's Name, the alleged drawer is not liable.

In contrast, the drawee bank is liable.

In detail, a drawee bank must re-credit the drawer's account because the check was not properly paid unless the bank has a valid defense.

Here, the drawee cannot go after the presenter for breach of presentment unless the presenter knows of the forgery.

The forger is liable to the drawee bank because he is treated as the real drawer.

The drawee bank has 2 defenses: The negligence rule and the bank statement rule.

Under the negligence rule, if the drawer's own negligence substantially contributed to the forgery, forgery is validated. And under the bank statement rule, a drawer has duty to inspect bank statements in a timely manner and report forgeries to the bank.

If the drawer does report, the bank will have to re-credit his account unless the bank can show that delay in reporting resulted in the bank suffering a loss.

For Example, if the forger has escaped.

The forged drawer's signature must be reported within 1 year or any claim is barred.

Also, under the repeat offender rule, if the same person is forging checks, the drawer must report the forgeries within 30 days of when statement was available.

If the drawer does not do that, the bank only has to re-credit those forged checks that were included in the statement.

4) Forgery of Payee's Name

Moving on, sometimes there is Forgery of the Payee's Name, which usually is a forgery of endorsements.

In a bearer paper, this forgery is irrelevant because endorsement is not necessary, whereas in order paper, forgery breaks the chain of title and the order paper is then not properly payable.

The drawer can demand that the drawee bank re-credit his account because it was not properly payable.

Also, the payee can bring a conversion action against the drawee or anyone who took the check if the payee had possession. There can only be 1 recovery against the drawee bank. If the payee

wins a conversion action, the drawer is not able to sue the drawee bank.

Nevertheless, the drawee bank has defenses.

One: Under the impostor rule, if a check is made out to an impostor, forgery is validated.

If the check is made out to a fictitious person, forgery is validated, and if a person makes out a check to a payee and then forges the payee's name and does not intend that the payee receive the check, the forgery is validated.

Two: Under the employee endorsement rule, if an employer entrusts an employee or an independent contractor with responsibility for an instrument and the employee forges it and the bank pays it in good faith, the forgery is validated.

Three: The drawer was negligent.

And four: The drawer failed to timely sue. He must sue within 3 years.

Now, if a drawee bank is forced to pay, it will then want to pass on liability, which can pass to the presenter or transferor. On passing liability to the presenter, a drawee bank can sue the presenter and those prior to the presenter for breaching the presentment warranty of entitled to enforce.

However, if it was the drawer's signature that was forged, the drawee bank could not go after presenter.

And on passing liability to the transferor, the presenter who loses to the drawee for breach of presentment can sue up the chain for breach of transfer warranty.

5) Alteration

There are two types of alterations:

One: Change in obligation, which is any unauthorized change in an instrument that changes the obligation of a party such as amount due, date, names of payees, or interest rate.

And two: Unauthorized completion, where an instrument is completed in an unauthorized manner.

These types of alterations have different effects on the holder in due course.

In a change in obligation, the holder in due course can enforce the original amount, while in an unauthorized completion, he can enforce the instrument as completed.

On the other hand, the effects are different for on a non-holder in due course.

If the alteration is fraudulently made by the holder, the obligor can be totally discharged.

However, if it is not fraudulently made by the holder, the obligor is still liable under the original terms.

Now, when an altered check is not properly payable, the drawer can sue the drawee bank.

The drawee bank's defenses are:

The drawer's negligence, where if the drawer's negligence substantially contributed to the alteration, then he cannot complain

And the bank statement rule, which state that the drawer must report the alteration within 1 year.

Lastly, a drawee can sue for breach of presentment. A presenter can then sue up the chain for breach of transfer warranties.

Secured Transactions.

Introduction

1) Scope of UCC 9

One: Collateralized transactions.

It is any transaction that is intended to create a security interest in personal property or fixtures.

The property used as collateral may be:

Already owned by the owner.

Acquired with loan.

For Example, with purchase money security interest.

And after-acquired.

Two: Sales of receivables, including the outright sale of:

Accounts,

Chattel paper,

Payment intangibles,

And promissory notes.

Three: Consignments.

A consignment is a bailment by the owner, bailor, or consignor under which the bailee or consignee has authority to sell.

A consignor must also comply with UCC9 to protect its interest in consigned goods against creditors of the consignee if:

Consigned goods are worth a total of \$1,000 or more,

The consignor did not use the goods for personal, family or household purposes,

And there is a potentially deceptive consignee.

A potentially deceptive consigner:

Deals with goods of that kind under a name other than the consignor's name,

And is not an auctioneer or generally known by the consignee's creditors to be substantially engaged in consigned goods.

Four: Agricultural liens created by statute are also within the scope of UCC9.

They are non-possessory liens on farm products such as crops and livestock created by state law in favor of a person who provides goods or services to a farmer.

And five: Lease-purchase agreements are within the scope.

In a lease-purchase, the transaction is a credit sale, rather than a true lease, if the lessee cannot terminate the lease plus one of the following:

The lease transfers the economic life of the goods,

The lessee is bound by mandatory renewals or buyouts,

The lessee has option to renew the lease for remaining economic life for no or nominal additional consideration,

Or the lessee has option to become the owner of the goods for no or nominal additional consideration.

2) Not Covered by UCC 9

One: Rights governed by federal law, such as ships, planes, and patents.

Two: Real property.

Remember, fixtures are not a part of a real property.

Three: Tort claims including commercial tort claims such as unfair competition.

Four: Deposit accounts in consumer transactions.

Five: Statutory lines.

For Example, the landlord and mechanics liens.

And six: Wage assignments.

Classifying Collateral

1) Goods

First, Goods are movable items and fixtures at the time security interest attaches.

Specific inclusions to goods include:

Standing timber.

Growing crops.

And unborn young of animals.

Whereas specific exclusions include:

Money.

Minerals before extraction are considered real property.

And collateral that fits other categories.

Also, there are four classifications of goods:

One: Consumer goods, which are goods used or bought primarily for personal, family, or household purposes.

Two: Inventory, which are goods held for sale or lease.

Three: Equipment, which are goods other than inventory or consumer goods. They must be moveable.

And four: Farm products, which must be in possession of a farmer and un-manufactured.

2) Semi-Tangible & Intangible Property

One: Instruments, including promissory notes and checks.

Two: Documents including:

Warehouse receipt, which are goods in storage.

And bill of lading, which are goods in transit.

Three: Chattel paper, which are writing showing both a monetary obligation and a security interest in goods or lease of goods.

Four: Account receivables, which is the right to payment for goods sold or leased or services rendered not shown on chattel paper.

Five: Deposit account and bank accounts.

Six: Investment property, which are stocks and bonds.

And seven: Commercial tort claims, which are business torts not involving personal injury.

3) Proceeds

Proceeds are whatever is received upon a sale, exchange, or other disposition of collateral.

A security interest in collateral automatically gives a secured party a security interest in the identifiable proceeds.

There is also right to proceeds after disposition, such as a sale and exchange.

If collateral is sold or otherwise disposed of and the secured party agreed to the disposition, then the secured party has a security interest only in the proceeds but not the collateral.

Now, if collateral is sold or otherwise disposed of, but the secured party did not agree to the disposition, then the secured party has a security interest in both the collateral and proceeds. However, the secured party can only get one satisfaction.

Nevertheless, when the proceeds are commingled with other property, the secured party only has rights to the proceeds if they are identifiable.

Attachment

1) Definition

Attachment is a process by which a security interest is created and becomes enforceable against the debtor so the creditor can repossess the collateral if the debtor does not pay.

2) 3 Elements of Valid Attachment

One: Either the debtor signs a security agreement or the secured party has possession of collateral or takes control of the collateral.

Here, the security agreement must provide a reasonable description of the collateral.

The description can be broad by category.

For Example, statement such as all my equipment or all my law books is a valid description.

Commercial tort claims and consumer goods must be specific.

A supergeneric description, such as statements all of my assets or all of my personal property, is not valid.

Moreover, security agreement can be satisfied by control if the collateral is:

Nonconsumer deposit account,

Electronic chattel paper,

Or investment property.

And the seller can get a security interest through an agreement that is much vaguer than a regular security agreement.

For Example, statements like "the seller keeps title" or "sale is with reservation" are valid agreement that allows the seller to get a security interest.

The second element of a valid attachment is that the secured party gives value. Here, the creditor lends money or gives goods on credit.

And third element is that the debtor has rights and ownership in the collateral.

3) After-Acquired Property

Security interest attaches when debtor gets rights in the new property.

The language that can create a security interest in after-acquired property are statements such as:

All inventory

Or equipment now owned or hereafter acquired.

However, a secured party cannot create an after-acquired interest in consumer goods unless the debtor gets consumer goods within 10 days after the secured party gives value.

The secured party also cannot create an after-acquired interest in commercial tort claims.

4) Future Advances

A security agreement can expressly provide that collateral secures future advances regardless of whether the secured party has made a commitment to make future advances.

Collateral secures not only the immediate loan, but other future advances, such as future loans.

Perfection

1) Perfection of Security Interest

Perfection is a process by which the creditor protects the security interest from most other claimants to the same collateral.

To perfect a security interest, a creditor needs to finish attachment and one of the following acts:

One: The creditor takes possession of collateral.

Two: The creditor files financing statement.

Three: There is an automatic perfection, such as a Purchase Money Security Interest in consumer goods.

Four: There is an automatic temporary perfection, such as proceeds.

Five: The creditor has the control over the collateral.

And six: There is a notation of security interest on certificate of title.

There is an order of perfection. This means that if a creditor files or takes possession before attachment, security interest is still not perfected until the attachment occurs because perfection cannot occur before attachment.

There are different ways to achieve perfection.

2) Perfection by Possession

Perfection by Possession applies any kind of collateral except: Accounts receivables.

Deposit accounts.

Nonnegotiable instruments.

And electronic chattel paper.

If collateral is already perfected by possession, a creditor can lose perfection once he loses possession of collateral unless the collateral falls within the 20 day temporary automatic perfection.

3) Perfection by Filing a Financing Statement

On the other hand, anything can be perfected by filing except for deposit accounts.

A financing statement must contain five things.

One: Names of the debtor and creditor.

An error in the debtor's name is acceptable unless it is seriously misleading, which means it is so misleading that a search of records of filing office under debtor's correct name would not disclose financing statement.

If the debtor makes a seriously misleading name change after a financing statement is filed, perfection continues for the collateral acquired by the debtor before the name change and within 4 months after the name change.

Any collateral acquired after 4 months is not perfected unless secured the party files under the debtor's new name within the 4 months

Two: Address of the debtor, secured party, or their representatives. These must be included in a financing statement unless the financing statement is accepted by the filing office.

Three: Description of collateral.

Here, the description can be supergeneric such as "all assets" or "all personal property."

It does not need to include the statement "after acquired property", but after acquired property needs to be included in security agreement.

Four: Description of land if it has timber, minerals, fixtures or crops.

And five: The debtor's authorization to file. A debtor can authorize the financing statement after filing.

Also, by entering into a security agreement, the debtor impliedly authorizes filing.

There are ways to deciding the location of filing a financing statement.

When the secured party does not have possession of collateral, financing statement should be filed in the state where the debtor is located.

If the debtor is an individual, filing should be done at his principal residence.

If the debtor is an organization with one place of business, filing is at the principal place of business.

If the organization has more than one place of business, filing is at the chief executive office.

And if the debtor is a corporation, filing is at the state of incorporation.

On the other hand, when the secured party has the possession of collateral, the financing statement is generally filed in the state where collateral is located.

Exceptions to this rule include:

One: For fixtures, filing occurs in the state where land is located.

Two: For timber, filing is at the state where timber is located.

Three: For certification of title items, in the state where the most recent certificate was issued.

Four: For deposit accounts, at the state the bank has its chief executive office.

And five: For agricultural liens, at the state where farm product is located.

If the debtor moves to another state, the security interest is perfected for another 4 months. However, if the creditor does not file in the new state within 4 months, then the security interest was never perfected.

The party filing the financing statement does not have to be a secured party. It can be any person as long as he is the appropriate person authorizes the filing.

Also, a financing statement lasts for 5 years, and then the secured party needs to file a continuation statement to extend for another 5 years.

This continuation statement can only be filed within 6 months before the expiration of the 5 year period.

If the financing statement period lapses, then the security interest becomes unperfected and is treated as if it was never perfected in the first place. In this case, the creditor who once had second priority now has first priority

Concerning a termination statement, in cases of consumer goods, when debt is repaid, the secured party must file a termination statement within 1 month or within 20 days after receiving a written demand from debtor.

For nonconsumer goods such as equipment and inventory, when debt is repaid, the secured party does not have to do anything until the debtor makes a written demand.

Here, when the debtor makes a written demand, the secured party must provide the debtor with a termination statement within 20 days, which the debtor has to file.

The person filing cannot file a financing statement that he knows is forged, contains false statement, or is groundless. This is fraudulent filing.

The minimum penalty is \$5,000 plus court costs and attorney's fees.

4) Automatic Perfection

Purchase Money Security Interest in consumer goods is automatically perfected when it attaches.

It can be created when:

A secured party sells goods to the debtor on credit and then takes a security interest in the goods sold,

Or when a secured party loans the debtor cash to buy goods, the debtor actually buys the goods, and the secured party takes a security interest in those goods.

Automatic perfection, however, does not apply to certification of title items and fixtures even if they are consumer goods.

5) Automatic Temporary Perfection

Proceeds are automatically perfected for 20 days if the original collateral was perfected.

Regarding the continuation of perfection beyond 20 days, if the debtor exchanges collateral for other collateral and no cash is involved, the secured party does not need to file a new financing statement to keep perfection as long as the filing office for the collateral is the same.

If the debtor exchanges collateral for cash, the secured party does not need to file a new financing statement to keep the collateral perfected.

And if the debtor exchanges collateral for cash and buys something else with that cash, then the secured party has to look at the financing statement and see what the description of the original collateral is.

If the description covers new collateral, then the secured party does not need to file a new financing statement.

If the description was narrow, then the secured party does not have to file a new financing statement to perfect the security interest in new collateral.

Also, instruments, negotiable documents, and certified securities are perfected for 20 days from the time of attachment if new value was given.

6) Certification of Title

Next, a Certification of Title can only perfect a security interest in automobiles, boats or manufactured homes by making a notation of security interest on the certificate of title.

The exception is that if the collateral is inventory, such as in a dealership, a secured party must file a financing statement.

7) Deposit Accounts

A party can take a security interest in a bank account as long as it is not a consumer transaction.

The creditor has the right to sell or cash in the collateral without further action in the following forms:

Investment property.

Nonconsumer deposit accounts.

And electronic chattel paper.

Priority of Security Interest

1) General Rules

The secured party and debtor cannot alter priority rights.

2) Secured vs. Unsecured Interest

However, the secured party can make an inter-creditor agreement with another secured party and alter priority rights.

The secured party with priority has priority even if he has notice that there is another secured party.

In comparing Secured versus Unsecured Interest, secured interest always wins.

The perfected status of the secured creditor is irrelevant

3) Priority among Conflicting SI

In comparing unperfected secured versus unperfected secured interest, the first security interest to attach wins.

And in situations of perfected secured versus unperfected secured interest, the perfected secured interest wins even if the second in time had knowledge of being second.

4) Perfected Secured vs. Perfected SI

The first party to either file or perfect the interest generally wins. Here, attachment is irrelevant.

There are exceptions to the rule that the first to either file or perfect the interest wins.

The first exception is when collateral is not in inventory or when the collateral is perfected by Purchase Money Security Interest.

When both collaterals are perfected, the one not in inventory and with Purchase Money Security Interest prevails even if it is not perfected first.

The Purchase Money Security Interest is perfected at the time the debtor receives possession of the collateral or within 20 days of when the debtor received possession of the collateral. There are also exceptions if one creditor has Purchase Money Security Interest in the inventory.

Purchase Money Security Interest prevails if:

Purchase Money Security Interest creditor perfected at the time debtor receives possession of the inventory,

And authenticated notice to all creditors who have already filed with respect to the collateral.

A notice must be given before the debtor receives possession of inventory and contain:

One: Explanation that the creditor is obtaining a Purchase Money Security Interest in inventory.

And two: Description of the collateral.

Also, a notice is effective for 5 years for deliveries of the same type of collateral.

Nevertheless:

If one creditor has a Purchase Money Security Interest in livestock, same rules as Purchase Money Security Interest with inventory apply.

In deposit account cases, the secured party with control wins.

And in investment property, the secured party with control also wins!

Secured Party vs. Purchaser

1) General Rule

The General Rule is if a debtor sells collateral to a purchaser, the secured party wins.

2) Exceptions

One: If the debtor has permission to sell, the purchaser wins.

Two: Between the purchaser and unperfected interest at the time of purchase, the purchaser wins if he:

Gives value,

Receives delivery of collateral,

And has no knowledge of the security interest at time of delivery.

Nevertheless, the purchaser loses if it is a Purchase Money Security Interest that is perfected within 20 days after the debtor sells collateral to the purchaser.

Three: The buyer in the ordinary course of business wins even over a perfected secured party if he buys goods in good faith

without knowledge that the sale violates rights of another person in the ordinary course of business.

Regarding the requirement that he is without knowledge of the sale violating the rights of another person, the buyer in the ordinary course of business can know that there is a security interest.

And regarding the requirement that a buyer is in the ordinary course of business, it means that he is buying from a person who is in the business of goods of that kind. This does not include a pawnbroker.

The exception here is that a secured party who is perfected by possession wins.

The purchaser takes free of any security interest created by the seller but not free of other security interest not created by the seller.

The fourth exception is consumers buying from consumers.

Consumer Buying from Consumer Example: Garage sale.

In cases where a consumer is buying from a consumer, the purchaser wins if:

Goods are consumer goods in the hands of the seller and buyer,

The buyer has no knowledge of the security interest,

The buyer pays value,

And no financing statement on goods is filed at the time of purchase.

However, a secured party who perfected by possession still wins.

The fifth exception is in a case of the purchaser versus the secured party for future advances.

The purchaser wins if the secured party obtains knowledge of the purchase or 45 days have elapsed from the date of the purchase.

And six: The holder in due course wins over everyone.

3) Secured Party vs. Lien Creditor

Lien creditor is an unsecured creditor who acquired a judicial lien or is a bankruptcy trustee.

Generally, if the secured party is perfected at the time lien attaches, the secured party wins.

If the secured party is not perfected at the time lien attaches, the lien creditor wins.

The exception, however, is if an unperfected Purchase Money Security Interest attaches to the collateral before a lien attaches, the Purchase Money Security Interest holder will have priority if he perfects by filing within 20 days after the debtor receives collateral.

The secured party will lose to the lien creditor for future advances after both:

The secured party obtains the knowledge of the lien,

And 45 days elapse from the date of the lien.

4) Secured Party vs. Statutory Mechanics Lien

The lien wins if:

The party with mechanics lien furnished services or materials with respect to the goods covered by the security interest, Furnishing was in the ordinary course of business, And collateral is in possession of the lien holder.

5) Deposit Accounts

When it is control versus no control, the secured party with control has priority over secured party with no control.

On the other hand, in cases of control versus control:

The secured party who becomes the bank's customer on deposit account has the best priority.

The secured party who is a bank where the account is located is the next.

And the secured party who has control by agreement is the last.

6) Chattel Paper Special Priority

If the purchaser of the chattel paper in good faith gives new value and takes possession of the chattel paper in ordinary course of business, then he has priority over the following security interest:

One: A security interest in chattel paper which is claimed merely as proceeds of inventory if the chattel paper does not identify another interest in it.

And two: Any other security interest, as long as purchaser acquires its interest without the knowledge that purchase violates rights of secured party. Here, to have priority, the purchaser cannot have any knowledge that there is any interest.

7) Proceeds

The priority is the same as the priority in the original collateral as long as the security interest in the proceeds is perfected.

8) Fixtures

Fixtures are collateral that was personal property but has becomes so affixed to real property that an interest in it arises under real estate law.

Fixture priority deals with the secured party versus the holder of real property mortgage.

The secured party may win if it is:

Perfected before real estate interest recorded,

And perfected with a fixture filing that describes the real property and is filed in the office where a mortgage on the real property would be recorded.

Now, the Purchase Money Security Interest creditor, even though perfected after real property interest is of record, can prevail if the Purchase Money Security Interest creditor perfected by fixture filing, within 20 days of good becoming a fixture.

The competing real estate interest is not a construction mortgage. To clarify, construction mortgage is the loan that

enabled the whole building process to begin and thus is not defeated by a later Purchase Money Security Interest. Readily removable collateral will be treated as a regular good and may be perfected without a fixture filing. Also, regarding a judicial lien, a security interest in fixtures that is perfected in any manner prevails over a later-acquired judicial lien even if the perfection was not done via a fixture filing.

9) Crops

A perfected security interest in crops has priority over a conflicting interest in the land on which the crops are growing. It does not matter who filed or perfected first.

Remedies of Secured Party upon Default

1) Repossession

Upon default, the secured party can repossess the collateral without notice.

Repossession can be done without judicial process if it does not breach the peace.

The secured party cannot delegate the duty not to breach the peace.

If the repossession person breaches the peace, the secured party is strictly liable.

Also, any secured party can repossess even if he does not have priority

2) After Repossession

The creditor can sell collateral or perform strict foreclosure.

If the creditor sells collateral, he can sue for deficiency and give surplus to the debtor.

And if creditor performs strict foreclosure, he can keep the collateral and release the debtor.

3) Collateral

There is a compliance requirement where every aspect of the disposition must be commercially reasonable.

Also, the secured party must give notice before the collateral unless the collateral is perishable collateral like strawberries, the collateral is threatening to decline speedily in value such as concert tickets, or the collateral is customarily sold on a recognized market, such as stocks.

Otherwise, this notice must be sent a reasonable amount of time before the sale, and it should be given to sureties and the debtor unless the debtor waived notice in a signed agreement after default.

The notice must include:

Description of the debtor and secured party,

Description of the collateral,

Method of sale such as public or private
Statement that the debtor is entitled to an accounting,
Time and place of public sale,
Time after which private sale will be made,
And for consumer goods, the notice must explain that the debtor is liable for deficiency and the phone number and address where the debtor can get information about this sale.
Nevertheless, a debtor has right to redeem, which means he has the right to cure the default and regain the collateral.
This is if:
The creditor has not yet sold or entered into a contract to sell,
Strict foreclosure has not yet occurred,
The debtor has not waived the right to redeem after default,
The debtor will tender fulfillment of all obligations,
And the debtor will tender the creditor's reasonable expenses.
The secured party has the right to purchase at resale.
In a public sale, he can purchase at resale, whereas in a private sale, he has no right to purchase unless the collateral is customarily sold in a recognized market or is subject to widely distributed standard price quotations.
The reselling secured party warrants title, possession, and quiet enjoyment of the collateral unless the secured party disclaims the warranties.
The resale proceeds should be applied to:
The secured party's reasonable expenses.
Satisfaction of the debt.
And satisfaction of subordinate creditors.
The surplus, if any, should be applied to the debtor.
After resale, if there is still a deficiency, the secured party can sue the debtor for it.
As for the penalty for not complying with resale requirements, the secured party is liable for actual damages.
If it is consumer goods, then there is automatic penalty of finance charge plus 10% of principal.
The effect on ability to recover deficiency in consumer transactions is an absolute bar to recovery of deficiency.
On the other hand, in nonconsumer transactions, there is a rebuttable presumption that the value of collateral was equal to amount of debt.

4) Strict Foreclosure

The General Rule is that the secured party may retain the collateral in total satisfaction of the debt.
In consumer goods, the secured party can keep the collateral in total satisfaction of the debt.
In contrast, in nonconsumer goods, the secured party can keep the collateral in total or partial satisfaction of the debt.
There are three requirements.

The Debtor must consent either expressly or impliedly. This means that he can consent expressly in a written agreement made after default. Or if he fails to object to a secured party's proposal within 20 days after the secured party sent the notice, he has consented impliedly. The secured party must also send a written notice to retain collateral to the debtor unless the debtor has waived notice in a written agreement after default. If collateral is a nonconsumer goods, then written notice is sent to creditors who have perfected by filing, who have a notation on certificate of title, or have given notice to secured party. If the debtor or another creditor objects in writing within 20 days, then the creditor may not keep the collateral and must conduct a resale. There is an exception for high equity consumer goods: If the debtor has paid at least 60% of the price, resale is necessary within 90 days of repossession.

Wills and Administration.

Execution of Wills

1) Formalities

The requirements are:

One: The testator must be of sound mind and 18 years of age, married, or in the armed forces.

Two: The will must be signed by the testator, or by someone at the testator's direction and in his presence, which is called the proxy signature.

Three: The will must be witnessed by 2 attesting witnesses over 14 years old.

And four: Each witness must sign in the testator's conscious presence.

This means that the testator must be generally conscious that the will is being signed by the witness.

Here, the testator does not have to see the process of signing. He only needs to be in the same room or close by where he could see is sufficient.

The testator is considered not in presence, however, if the witness signs the will in an adjoining room or while the testator is unconscious.

For Example, if the testator is dead or in a coma.

On the other hand, witnesses do not need to know that they are signing a will or sign in each other's presence. Also, the testator does not need to sign in presence of witnesses or sign before the witnesses. This means the testator can sign afterwards as long as he signs immediately afterwards. The testator also does not have to sign at the end of the will or date the will.

2) Attestation Clause

Next, the Attestation Clause is a clause that appears at the end of a will and describes what just happened.

This clause is not mandatory but optional in Texas.

The clause is prima facie evidence of the facts recited, and it is useful when a witness has bad memory is a hostile witness who says the testator was not in room when witness signed

3) Codicil

Moving on, a Codicil is a later amendment or supplement to a will.

It must be executed with the same formalities as a will.

Furthermore, Texas allows a holographic codicil to an attested will or an attested codicil to a holographic will.

4) Proving Will in Probate

To Prove a Will in Probate, the execution of a will can be proven by the testimony of 1 attesting witness in open court.

If a witness resides outside the county, it can be proven by a deposition or interrogatory.

It can also be proven by a self-proving affidavit.

And if all witnesses are dead or cannot be located, it can be proven by testimony of 2 persons who are familiar with the testator's signature or signature of either attesting witness.

The venue is usually the county where the decedent resided.

However, if the decedent was a nonresident, then the venue should be the county where the principal property is located or the county where he died.

Nonresident Example: Decedent having no domicile or residence in Texas.

Now, contents of a safe deposit box may be examined, without a court order, in the presence of a bank official by the decedent's spouse, his child over 18, or the person named as the executor in the will.

A will found in safe deposit box may be delivered to the executor named in will or the probate court.

The self proving affidavit is a notarized statement of what just happened.

It serves the same function as deposition and interrogatory and acts as a substitute for the attesting witness's testimony in court.

If the will does not contain signatures of attesting witnesses, but self proving affidavit does, a party can use those signatures to validate the will. In this case, the will is not self proved and has to call 1 witness to testify.

In a privity bar, an attorney is not liable to anyone but the client, who is usually the decedent.

If the attorney made a mistake, estate can sue the attorney.

Beneficiaries, on the other hand, cannot sue the attorney.

When the attorney represents the executor, all attorney-client communications are privileged and cannot be discovered by beneficiaries.

5) Interested Witness

Lastly, in cases of an Interested Witness, which is an attesting witness who is also a beneficiary under the will, the will is still valid but the gift to the witness is void unless either: The will can be proved without the interested witness' testimony, Or the interested witness's testimony is corroborated by the testimony of a disinterested and credible person, such as a person who was present at the will execution.

If the interested witness would be an heir and there is no valid will, then he takes the lesser of the legacy under will or the intestate share.

Example:

If the testator leaves a will with a bequest of \$20,000 to his nephew Nathan, then Nathan is an interested witness to the will. If a will were found to be invalid, Nathan would receive \$9,000 as an heir.

Nathan gets \$9,000 unless 1 disinterested and credible person corroborates his will, then he can get \$20,000.

Other Wills

1) Holographic Will

The first is a Holographic Will, which is a handwritten will without witnesses.

Holographic will can be valid in Texas even if it was not valid in the state the testator lived in when he wrote it.

For Example, the holographic will is still valid if a client moved and was domiciled in Texas when he died.

There are three requirements of a holographic will:

One: It must be entirely handwritten by the testator. If any part is mechanically produced, it is not wholly in handwriting and is not a will unless it is mere extra printed words that are not necessary to complete the will.

Two: It must be signed by the testator. Where the quote "I, John smith" is good enough a signature, the word "I" without a name is not enough.

And three: Handwritten portions must show testamentary intent. An issue arises when the will does not have the statement "this is my will".

On Exam: Look for words that show there was intent to dispose of property.

For Example, "I, John Smith, leave my property to" sounds like a will.

Extrinsic evidence is admissible if the will is ambiguous.

Also, the testator must be intended to take effect at the testator's death.

To prove a holographic will, there has to be at least 2 people to testify that it is wholly in the testator's handwriting.

There can be a holographic codicil to a typewritten, witnessed will.

2) Nuncupative Will

Next, a Nuncupative Will is an oral will.

In Texas, nuncupative wills made on or after September 1, 2007 are not valid. However, you need to learn about it because oral wills made before September 1, 2007 are still valid.

Oral will is made during the testator's last illness at his home or if he is sick away from home and dies before returning.

It is for personal property only.

And if an oral will disposes of more than \$30, it must have 3 witnesses to be valid.

Lapse

1) Intestate Rules Application

In general, if a will is executed and the beneficiary dies before the testator or within 120 hours of testator's death, the gift to the beneficiary lapses.

However, an anti-lapse statute will substitute another beneficiary for the dead one.

The anti-lapse statute only applies to gifts under a will.

Also, anti-lapse will not apply if there is an express requirement of survivorship.

No Substitute Beneficiaries Example: "If he survives me".

If no one qualifies to take by anti-lapse, the gift lapses and goes into residue.

As the consequence, the predeceasing beneficiary must be a descendant of the testator's parents, such as the testator's children, grandchildren, siblings, or nieces, and the

predeceasing beneficiary must leave descendants who survive the testator by 120 hours.

Examples:

If the testator leaves something to his brother and his brother dies before the testator, the brother's children can take place of brother.

If the testator leaves something to his child and his child dies before the testator, child's children can take place of that child.

For the Lapse in Residuary Estate, under the surviving residuary beneficiaries rule, when the residuary estate is devised to 2 or more persons and the gift to one of them lapses, the remaining beneficiaries take the residuary estate in proportion to their interests.

Example:

If the testator's will devises that "all the rest and residue of my estate in equal shares to my good friend Alan, my brother Bill and my sister Clara", and Alan dies before the testator, leaving a child, Andy, who survives the testator by 120 hours. Also, Bill and Clara survive Testator.

Since Alan is a friend, not a descendant of the testator's parents, anti-lapse statute does not apply.

Bill and Clara, on the other hand, can take half each as surviving residuary beneficiaries.

Furthermore, the anti-lapse statute trumps surviving residuary beneficiaries rules.

Example: With the same facts as the last example, if Clara predeceases the testator, leaving a child, Carl, who survives the testator by 120 hours, and Alan and Bill also survive Testator, then Carl gets Clara's 1/3 share of residuary estate under anti-lapse statute because Clara was a sister of the testator and anti-lapse statute trumps the surviving residuary beneficiary rule.

Under the lapse rule, if there is a class gift and a member dies before the testator, the gift does not lapse, rather, the class members who are alive at the testator's death divide the total gift.

Example:

The testator leaves Blackacre to the children of his friend Joe and the residuary to his wife.

At the time the will was executed, Joe had 2 children, Al and Bill, but after the will is executed and before the testator's death, Carl is born to Joe.

Al dies but is survived by a son, Al, Jr. And then the testator dies.

18 months later, Joe has a child, Donna.

Results:

Bill and Carl take half each as surviving members.
Under the rule of convenience, a class closes at the testator's death. Therefore, Donna is excluded from sharing in the gift. Subject to the gestation principle, to be included in a class, a child has to be conceived for at least 300 days at the time of the testator's death.

And under the anti-lapse rule, if the class member that died was also a descendant of the testator's parents who left children, his gift should not pass to other class members but rather it should pass to the issue of the dead class member.

With the same facts as above, if the will specifies that it is the gift to "children of his brother, Joe", since Al was a descendant of the testator's parents, anti-lapse statute applies and Al, Jr. would take the gift.

3 Methods for Distribution:

One: Based on per capita, there should be one share for each descendant.

The language that makes per capita is "to my descendant per capita."

On Exam: To find out the distribution, count the number of people alive and divide by that number.

Two: Based on per stirpes, there would be one share for each family line.

The language that creates per stirpes is "to my descendants per stirpes."

Under the per stirpes distribution, the descendants of a deceased person take by representation the share that the deceased person would have taken had he survived to be an heir.

And three: when there is per capita with representation, heirs take equally at the first generational level with a living heir.

Intestate Succession

1) Application

Intestate rules apply when:

The decedent leaves no will

His will is not valid,

The will does not make a complete disposition of the estate,

Or his heir successfully contests the will and the will is denied probate.

2) Married Persons

In cases of intestate succession for Married Persons, property can be categorized into community or separate property.

If all children belong to both the dead and surviving spouse, then all community property goes to surviving spouse.

If there are mixed children, then the surviving spouse gets half of the community property, and the dead spouse's children, both mixed and whole, share his half of the community property.

If there are no children left, then all community property goes to the surviving spouse.

On the other hand, one third of separate personal property will be given to spouse and two thirds to the children or their descendants.

For separate real property, one third life estate goes to the surviving spouse and two thirds remainder to their children or descendants.

If they do not have children, the spouse gets all of the separate personal property that belongs to him.

And for separate real property, the spouse gets half in fee simple, and the decedent's parents or their descendants, such as the dead spouse's brothers and sisters, get half in fee simple. However, if there are no surviving parents or descendants, then the spouse gets all.

On Exam: After discussing distribution among the spouse and children or descendants, mention homestead, exempt personal property set-aside, and family allowance.

3) Intestate Law for Single Decedent

The Intestate Law for a Single Decedent is that his descendants take all.

Nevertheless, if he has no descendants, there are different situations.

One: If both of his parents are alive, each of his parents gets half of his estate.

Two: If only 1 parent is alive, that parent receives half while the other half goes to his brothers and sisters or their descendants.

If there are no brothers or sisters, then all of it goes to the surviving parent.

Three: If no parents are alive, then estate passes to his brothers and sisters or their descendants.

Four: If the decedent has no surviving parents, brothers or sisters, or the brothers and sisters' descendants, half of his estate goes to his maternal grandparents and the other half to his paternal grandparents.

And of course, if one side has all died out, then all estate passes to the surviving side.

4) Shares of Ancestors & Collaterals

Laughing heirs are persons so remotely related to the decedent that they suffer no sadness at the decedent's death.

In Texas, laughing heirs are not cut off.

Moreover, a half-blood collateral kin gets only half as much as a full blood.

In detail, if a person dies and the estate is going to pass to their siblings, a half sibling will only inherit half as much as a full blood sibling. This means that full bloods are treated as 2 people when dividing shares.

5) Children Born Out of Wedlock

They cannot inherit from their natural fathers.

There are exceptions to this rule, where children born out of wedlock can inherit from their natural father if:

One: There is a presumption of paternity under Family Code.

This presumption exists if the child was born during or within 300 days after marriage. A child born within 300 days after his father has died is presumed to be the child of the dead father and can inherit.

This presumption also exists if the parties married after child's birth and the man voluntarily asserted his paternity in one of 3 ways:

In a record filed with Bureau of Vital Statistics,

By consenting to be named father on birth certificate,

Or by promising in a record to support the child.

And the presumption also exists if during the first 2 years of a child's life, a man resided with him, and the man represented to others that he was the father.

Two: Children born out of wedlock can inherit from their natural father if the natural father signed a sworn statement acknowledging paternity,

Three: Paternity was established in a paternity suit,

Or four: Paternity is established in probate proceedings by clear and convincing evidence

Additionally, for good cause, Court may order a genetic testing.

Now, step or foster children cannot inherit from their stepparents or foster parents except in cases of equitable adoption, where a child can inherit from a step or foster parent but cannot inherit from their relatives.

The rule requires that step or foster parents take custody of a child under a valid agreement with the legal custodian that they will adopt the child.

6) Inheritance Rights of Adopted Children

Adopted child can inherit from adoptive parent and their relatives.

Adopted child can also inherit from biological parents and their relatives unless parental rights have been terminated.

Adoptive parents can inherit from adopted child.

However, biological parents cannot inherit from adopted child.

Also, adult adoption is allowed.

Bars to Inheritance

1) 120 Hour Rule

Under the 120 hour rule, an heir has to survive the decedent by 120 hours or 5 days in order to take.

If the heir fails to survive by 120 hours, then he is deemed to have predeceased the decedent.

Also, the anti-lapse statute applies in wills.

This rule applies in intestacy and wills.

When it applies to community property, each spouse is treated as if they survived the other, and the disposal of community property applies.

The 120 hour rule also applies to joint tenancies with right of survivorship and life insurance policies.

It does not apply if a different provision has been made in the will, deed, etc. which provides for longer or shorter survival times.

For Example, "if she survives me" means survival by an instant of time.

2) Disclaimer

Parties who can make a disclaimer include intestate heirs and testate heirs.

Also, an executor or guardian can make a disclaimer on behalf of a deceased, incapacitated person, or heir.

On the other hand, parents cannot disclaim on behalf of their children, only a personal representative may.

A valid disclaimer must be:

Written, signed and acknowledge.

Filed within 9 months after decedent's death.

And filed with the probate court with a copy to personal representative.

When disclaimer is in effect, the disclaimant is treated as if they predeceased the decedent.

Again, when a person is dealing with a will, anti-lapse statute applies.

Let me summarize the seven general rules:

Disclaimer can be partial.

Disclaimer is irrevocable.

Intestate heirs can disclaim.

The executor or guardian can disclaim on behalf of a minor child.

A parent, acting as a parent, cannot disclaim on behalf of a minor child.

A child can disclaim within 9 months of turning 21.

And the charitable beneficiary can disclaim within 9 months of receiving notice of the gift.

Reasons to disclaim are to avoid gift taxes and creditor's claims.

Gifts Made During Lifetime

1) Advancement

Advancement is a gift made by the testator, while he was alive, to his heir.

The value of an advancement is what is intended to be deducted from the heir's eventual share in the estate after the testator's death.

It only applies to intestacy.

A lifetime gift to a descendant is not treated as an advancement unless:

There is a contemporaneous writing by the donor stating that the gift was meant as an advancement,

Or the donee acknowledges such in writing.

2) Satisfaction

A lifetime gift to a will beneficiary is not a partial satisfaction of a gift made in an earlier will unless there is a contemporaneous writing by the donor stating that the gift was meant as a satisfaction, or the writing has to accompany the gift.

Changes after Will Executed

1) Marriage

First, there is no effect of a marriage.

This means that if a testator marries after a will is executed, the marriage has no effect on will. The marriage does not protect pretermitted or omitted spouse.

And it is up to the testator to update his will and include spouse.

2) Omitted Spouse

However, an omitted spouse can claim homestead. Personal property set aside, and family allowance.

Breaking these claims down, the omitted spouse can get:

\$15,000 allowance in place of homestead if do not own homestead.

\$5,000 in place of other exempt property.

And money amount for support for one year.

3) Divorce

Divorce or annulment of a marriage revokes all gifts in a will that were in favor of the ex-spouse and any fiduciary appointments.

The ex-spouse gets nothing unless they remarry each other.

4) Pretermitted Child

It occurs when a child is omitted from the will because the will was executed before the child was born or adopted.

If there are no other children when the will is executed, the child takes intestate share of all property not bequeathed to the other parent.

On the other hand, if there are other children but they are not provided for, the omitted child takes intestate share of all property not bequeathed to the other parent.

If there are other children who are provided for, then the child's share is limited to the gifts to such other children.

Nobody else's gift is reduced.

If there are other children, and the children provided for were devised different amounts, then give the pretermitted child their fair share of each gift.

Now, the pretermitted statute also applies to children born out of wedlock.

However, a pretermitted child statute does not apply if:

The child is provided for or mentioned in the will,

Or if the child is provided for by a nonprobate transfer that takes effect at the testator's death.

In addition, if a nonprobate transfer reflects that the testator-parent was mindful of the child, the child has no rights under the statute.

Revocation of Wills

1) Revoke Methods

Wills can be revoked by subsequent writing or by physical act.

Let's look at these two methods in detail.

Regarding the subsequent writing:

Holographic will can revoke a typewritten attested will and vice versa as long as they are valid.

A will is expressly revoked if the subsequent instrument states that it replaces the old will.

A will can be impliedly revoked partially or totally when the subsequent instrument is inconsistent.

If a testator executes a second will that does not expressly revoke an earlier will, courts, if at all possible, try to reconcile the wills and read them together as one will by treating the second will as a codicil.

If the second will is totally inconsistent with the first will, however, Court cannot reconcile and the second will revokes first will.

And revoking a codicil does not revoke the entire will: Part of the will that was modified or revoked by codicil takes effect again.

In contrast, to revoke a will by physical act, there needs to be a physical act and intent to revoke.

Physical act includes tearing, burning, cutting, and canceling a will.

This physical act has to be done by the testator, or caused by the testator to be done by someone else in the testator's presence and at his direction.

As for the intent, the physical act cannot be an accident.

2) Presumptions

One: If the testator was the last one to have possession of the will, and the will cannot be found, the presumption is that the testator destroyed and revoked the will.

And two: If the testator was last seen with the will and it is found destroyed, there is a presumption that he has revoked his will and all copies even if a copy exists which is not in his possession.

Nevertheless, these presumptions do not arise if the will was last seen in possession of someone who was adversely affected by its contents, and the presumptions can be rebutted.

3) Probating Lost Wills

The following elements need to be satisfied:

Due execution must be proved by witnesses,

The cause of will's non-production must be proved,

And the content of the will must be substantially proved by a person who has read the will or heard it read.

4) Changes on Face of Executed Will

First, words added to a will after it has been executed are disregarded unless it is a valid attested or holographic codicil. Attested codicil is a codicil that is witnessed and signed and means something on its own, and a holographic codicil is a handwritten and signed codicil that means something on its own. Second, words crossed out in an attested will after it has been executed are not valid.

Here, a partial revocation by physical act, such as lines through portions of a will, is not allowed. If the testator wants to change the will, he has to write a new one or make a codicil to existing one.

And third, words crossed out in a holographic will after it has been executed are valid if at least 2 persons testify that it is wholly in the testator's handwriting.

5) Will Revival

The dependent relative revocation doctrine can revive a provision of a former will that has been revoked where:

The new will or codicil is void by operation of law.

The former provision was revoked at the same time the new provision was created.

The testator believed the new provision was valid,

And but-for the testator's belief that the new will was valid, he would not have revoked the former provision.

If the testator crosses something out, thinking it is valid to do so, then the cross-out is undo.

If the testator destroys the first will after the second will turns out to be defectively executed, it will reinstate the first will.

And if the testator writes on the back of the first will stating "Will-1 is revoked because I have made a new will", the revocation is set aside because the mistake is regarding the revocation.

Example:

Will-1 is executed,

Will-2 is executed and revokes Will-1,

And the testator destroys Will-2 and wants to bring back Will-1, Both wills would have been revoked, and the revocation of Will-2 will only bring back Will-1 if:

Will-1 still exists.

The testator wanted Will-1 back.

And Will-2 is revoked by physical act.

Bars to Testamentary Gifts Succession

1) Testamentary Gifts

There are 5 types of testamentary gifts:

One: Specific device or bequest refers to a particular item specified in the will.

Example: "I devise Blackacre to my son John".

Two: General legacy refers to money not from a particular asset.

Example: "I give \$10,000 to my nephew John".

Three: Demonstrative legacy refers to money from a particular account.

Example: "\$10,000 to be paid from the sale of my GM stock".

Four: Residuary gift refers to everything else that is not specified.

Residuary Gift Example: "I give all the rest, residue and remainder of my estate to Bob."

And five: Intestate property, which is property passing under partial intestacy because a will was poorly drafted and does not contain a residuary clause.

2) Abatement

Abatement arises when there is not enough property in the estate to pay both the debts and all the gifts made in the will.

The order of abatement can be changed by the will or rebutted by intent.

Debts should be paid by sacrificing gifts in the order of:

Intestate property

Residue property

General property

Then specific property

In detail, intestate property should be paid first if the testator died partially intestate.

For residue, general property, and specific property, personal property is paid first, then real property.

Next, demonstrative legacies are treated the same as specific bequest to the extent of the value of specified property and treated as a general legacy to the extent of excess.

For Example, if a will made a bequest of \$25,000 to be paid out of proceeds of sale of IBM stock, but the stock was only worth \$16,000 at Testator's death, for abatement purposes, it would be treated as a specific bequest as to \$16,000 and as a general legacy as to \$9,000.

3) Pro Rata Apportionment of Estate Taxes

When the testator dies, his estate is going to be taxed.

Every beneficiary of the will has to help pay these taxes, except beneficiaries of interests that qualify for charitable or marital deduction do not have to pay.

Beneficiaries pay in proportion of the amount of the estate they received.

To calculate this portion, add up the estate and figure out the percentage of the estate each beneficiary received, and each beneficiary pays tax according to their percentage.

4) Ademption

Ademption refers to a property that was given away in a will and does not exist at the time of the testator's death. Here, the beneficiary of the gift gets nothing.

Ademption only applies to specific gifts.

Stock Example:

"I give my 100 shares of stock" is specific gift that may be adeemed or taken away.

"I give 100 shares of stock" is a general legacy that cannot be adeemed, where the beneficiary gets value of the stock at the date of death.

Stock from a stock split and stock dividend declared after a will is executed are specific bequests.

Nonetheless, when the estate is to be given the proceeds from the sale of an asset that has been sold before the testator dies, then the beneficiaries are entitled to the proceeds if the proceeds can be traced.

Under the identity doctrine, if a beneficiary is given a gift under a will, the gift is destroyed before the testator dies, and insurance proceeds are given for that destroyed gift, that beneficiary is not entitled to the proceeds. The testator's intent is irrelevant.

5) Exoneration of Liens

It only applies to wills.

In Texas, exoneration of liens doctrine have been abolished to wills executed on or after September 1, 2005.

If the testator gives specific gift under will, but the specific gift is encumbered with a lien, such as a mortgage, the executor must pay lien out of the residuary estate so that the lien is exonerated.

Also, the beneficiary takes free of the lien if the testator was personally liable for the lien.

On the other hand, if the testator was not personally liable for the lien, such as a non-recourse debt, the lien is not exonerated.

A lien can only be paid out of residuary estate.

Reference to Acts and Events outside Will

1) Incorporation by Reference

The testator can incorporate a document into a will by referring to it in the will if all of the three following elements are met.

One: The document is in existence at the time the will is executed,

Two: The will shows intent to incorporate the writing,

And three: The document is clearly identified in the will.

For Example, the quote "For details see attached sheet" is not clearly identified.

2) Acts of Independent Significance

Acts of independent significance have no effect on terms of the will if it was a lifetime act with a lifetime purpose or motive, without intent to change the will.

3) Contents of Property Bequeathed

A bequeath of property, such as a desk or house, does not include the contents within the property unless the language of the will specifically provides so.

The content refers to tangible property and cash only. It does not include deeds, stock certificates, and etc.

4) Mistakes or Ambiguities in The Will

Under the plain meaning rule, if there is no ambiguity in the will, the language of the will controls, even if there is a mistake in the will because there is a conclusive presumption that the testator read the will and intended all of its contents. Here, extrinsic evidence is admissible to cure a latent or patent ambiguity.

Latent ambiguity is where the mistake is not apparent on the face of the will, whereas latent ambiguity is when the mistake is apparent on the face of the will.

If extrinsic evidence does not cure the ambiguity, the gift fails.

5) Contracts Relating to Wills

A contract to make a will or not to revoke a will can be established only by stating that a contract does exist and stating the material terms of the contract, or, by a binding and enforceable written agreement.

The execution of a joint will or reciprocal will does not, of itself, suffice as evidence of the existence of a contract.

A contractual will can be revoked by giving notice to the other party to the contract.

6) Non-Probate Assets

Non-probate Assets are interests that pass at death other than by will or intestacy.

They are not part of the probate estate for administration purposes.

Major types of non-probate assets include:

Property passes by right of survivorship, such as joint bank accounts.

Property passes by contract, such as life insurance and employee death benefits.

Property held in trust.

And property over which the decedent held a power of appointment.

7) Negative Bequests

Here, words of disinheritance in a will are given full effect in Texas, even if there is a partial intestacy. When a person is disinherited, that person's children may still inherit as heirs.

Powers of Appointment

1) Purpose

The purpose of powers of appointment is that it permits the life beneficiary to designate the remaindermen.

2) Rules

If a donee has general powers of appointment, he can appoint the property to anyone, including himself, his creditors, or his estate.

But if a donee has special powers of appointment, he can appoint the property only to those members in the specified class.

Also, to exercise a power of appointment, there must be a specific reference to the power. A blanket exercise of the power is insufficient.

Will Contests

1) Standing

Only interested parties have standing to bring a will contest.

People with an economic interest that would be adversely affected by a will's probate can bring a will contest. They are either heirs or legatees under an earlier will whose interest would be defeated if this will was probated.

2) Testamentary Capacity

If the testator is of legal age, he must also have the capacity to create a will, which means that he:

Understands the nature of the act he is doing, such as writing a will.

Knows the nature and approximate value of his property.

Knows the natural objects of his bounty.

And understands the disposition he is making.

The evidence of a testator's capacity must relate to the circumstances at or near the time the will was executed.

Adjudication of incapacity is admissible as evidence of incapacity, but it does not mean a person lacks the capacity to create a will. In other words, the jury could still find that the will was created during a lucid interval.

3) Undue Influence

Assuming the testator is of legal age and sufficient capacity, undue influence requires contestant to prove:

The existence and exertion of influence,

The effect was to overpower the mind and will of the testator,

And that the product was a will or gift in will that would not have been made but for the influence.

Examples of situations that are not enough to form undue influence:

Mere opportunity to exert influence.

Mere susceptibility to influence due to illness or age.

And mere fact of unnatural disposition.

Where a will is procured by one in a confidential relationship, there is an inference of undue influence, which is strengthened when there are suspicious circumstances.

Also, if an attorney drafts a will that makes a gift to the attorney, or to his heir or employee, the gift is void.

This is unless the beneficiary was related to the testator within the third degree by blood or marriage.

4) No-Contest Clause

No-contest Clauses are given full effect unless Court finds that the contest was brought in good faith and with probable cause.

No-contest clauses do not apply to and thus do not lose gift when there is a:

A will construction suit, where the suit was filed to determine what the will means.

An action brought against the executor alleging improper administration of the estate.

A contest is brought by the guardian of an incapacitated beneficiary,
Or the mere filing of will contest, and the party then voluntarily dismisses the action.

Wills Administration

1) Independent Administration

It is the central feature of Texas estate administration. As a result, most estates in Texas are administered without court supervision or involvement.

Also, a person can have independent administration when it is provided for in the will or if all distributees agree.

As long as the will provides that independent administration is preferred, it is sufficient. Here, words can be informal.

It is also sufficient if all distributees agree unless the judge finds that independent administration is not in the best interest of the estate.

To clarify, if there is a trust created, income beneficiaries must agree, but remaindermen do not have to agree.

And if the distributee under independent administration is a minor or incapacitated, his guardian can agree.

Without court order, an independent executor can do anything a dependent administrator can be authorized to do, as long as the act relates to proper settlement of estate or preservation of estate assets.

However, the power of sale is not given to the independent executor. Any purchaser then will have to show that the executor had authority to sell the property. If there was enough cash in the estate to pay debts, then the purchaser is not protected.

Concerning the accounting from independent executor, interested parties are entitled to an accounting on demand either:

15 months after the will is admitted to probate,

Or 12 months after the last accounting was rendered.

Now, the following procedures to close administration by an independent executor are optional.

File closing report with verified affidavit that property initially received, debts and expenses paid, and names and addresses of distributees.

Or file for declaratory judgment seeking judicial discharge from further liability.

As for compelling closing or distribution from independent executor, an interested party can petition for distribution 2 years after the executor was appointed.

This is a show cause hearing where a party can ask for a distribution, but there is no absolute right for the distribution.

Actions the personal representative must take within 120 days of appointment include:

Post fiduciary bond within 20 days.

Publish notice of administration in newspaper of general circulation within 1 month.

File inventory of estate within 90 days.

And give notice to charitable beneficiaries within 30 days after will is admitted to probate.

Now, an independent executor may be removed for cause if he:

One: Fails to return inventory within 90 days of appointment.

Two: Fails to give notice to charitable beneficiaries within 30 days of will being admitted to probate.

Three: Misapplied or embezzled property.

Four: Fails to make a required accounting.

Five: Is guilty of gross misconduct or mismanagement.

Or six: Is incompetent or is sentenced to penitentiary.

Furthermore, jurisdiction in will administration has the identical rules with the one in guardianship.

Within counties with statutory county courts at law or statutory probate courts, county court has exclusive original jurisdiction.

On the other hand, within counties with only constitutional county courts:

County court and district court have concurrent jurisdiction.

And the county court judge can request a statutory probate court judge assigned to the case.

2) Muniment of Title

Muniment of Title is a unique Texas procedure where the will is filed through a probate proceeding to transfer the ownership of real estate to the beneficiaries in the will without a deed or a full probate.

There is no need to appoint the executor, but it needs formal recognition to establish title.

A person can only admit the will to probate using a muniment of title if there are no unpaid debts, other than the mortgage on the homestead.

3) Statutory Heirship Proceeding

If there is no will, a statutory heirship proceeding can establish by court order that a person died without a will and was survived by heirs named by the court.

On Exam: When the deceased dies intestate without a need for formal administration, use statutory heirship proceeding to formally recognize the title of successors by inheritance.

The statutory heirship proceeding can also be used to collect a bank account in the decedent's name. Wherein the bank is protected if it pays in reliance on the order.

4) Small Estate Administration

This process is only available to those who die without a will and leave an estate worth less than \$50,000 not including the homestead.

The executor needs to file an affidavit if value of intestate probate estate is less than \$50,000. The \$50,000 does not include homestead, exempt personal property, or non-probate property.

Additionally, this process can be used to clear title to the homestead but not any other real property.

5) Qualified Community Administration

Texas law provides that when a spouse dies without a will and all children are born of the marriage, the community property passes to the surviving spouse.

However, if the decedent dies intestate with descendants other than the ones with his wife, the surviving spouse must qualify with a bond and has the power of an independent executor.

Here, distribution cannot be compelled until 12 months pass.

6) Non-statutory Affidavit of Heirship

It is a process used to clear title to the land where the owner died years ago and no action was taken to clear title to land. The filing party can get affidavits from neighbors or relatives of family history and file affidavit in county records.

Will Probate

1) Summary

Will probate is the court process by which a will is proved valid or invalid, and probate is the legal process wherein the estate of a decedent is administered.

2) Unsuccessful Will Probate

For fees in an unsuccessful will probate, the party who brought the will to probate is entitled to attorney fees if the will was brought in good faith.

3) Temporary Administrator

A temporary administrator can be appointed pending appointment of a permanent personal representative.

Temporary administrator powers are limited to those granted by Court.

And temporary administrator appointment cannot exceed 180 days, except in a will contest, where temporary administrator can last until the will contest ends.

4) Recording Title to Probate Property

To record title to probate property, nothing needs to be done in the county of probate.

The filing party simply needs to file a will and order admitting title to probate in any other county or state where the property is located.

5) Second Will Found

In setting aside a deed when a second will is found, as long as the order admitting the first will to probate was validly entered, then a bona fide purchaser who relies on a valid court order is protected.

The taker under the second will has an action to recover sale proceeds against the party who sold the land.

6) Time to Probate Will

A filing party must offer the will within 4 years of the deceased's death unless the filing party can show that he could not have known about the will.

If the will is probated after its time limit, it will only be as a muniment of title and no estate administration can be opened.

7) Personal Representative

This following priority list does not apply to temporary administrator, which court can appoint whoever they want.

The priority list as to who can be appointed as the personal representative is:

The executor named in will.

The surviving spouse if the deceased dies intestate.

The principal beneficiary named in will.

Any other beneficiary named in will.

And the next of kin, in the nearest order of kinship if the deceased dies intestate.

8) Nonresident

Lastly, a nonresident of Texas can serve as guardian or personal representative as long as they appoint a resident agent for service of process.

However, the following people cannot be a personal representative:

Minors.

Incapacitated persons.

Convicted felons.

And a person whom the court finds unsuitable.

Liability of Personal Representative

1) General Rule

Before we go into any details, let's cover the general rule of personal representative. That is, a personal representative has the general fiduciary duty to act like a prudent person in all circumstances.

2) Compensation of Executors & Administrators

The Compensation of Executors and Administrators is ruled by the 5% in 5% out rule, where absent a contrary will provision,

executors and administrators are entitled to 5% of all sums actually received and 5% of all sums paid out in cash. This rule does not apply to cash on hand or the collection of life insurance policies.

In addition, this rule does not apply to distributions to the beneficiaries or heirs.

3) Notice to Creditors in Administration

There are three types of Notice to Creditors in Dependent or Independent Administration.

The first one is notice by publication. Within 1 month of being issued letters testamentary, personal representative must publish notice in a newspaper of general circulation.

The second is permissive personal notice to unsecured creditors, where personal representative may give notice that the creditor must present the claim within 4 months, or the claim is barred. And the third is personal notice to secured creditors. Within 2 months, personal representative must give personal notice to creditors by registered or certified mail.

4) Creditors Procedures

In dependent administration, creditors must file an authenticated claim supported by an affidavit with Court or the administrator.

The administrator must write a memo allowing or rejecting the claim within 30 days. If nothing is done, then the claim is presumed rejected.

If the claim is disallowed, the creditor must file suit within 90 days or the claim is barred.

Here, the creditor cannot bring a claim for money unless they first present it to the administrator and it is rejected. This rule does not apply to unliquidated or contingent claims.

In independent administration, the failure to present a claim does not affect the creditor's right to bring an action on the claim.

5) Suing Estate

In the lawsuit, the filing party cannot name an estate because it is not an entity, but the filing party has to name the personal representative.

In a matured secured claim, where there was personal liability on a note secured by a mortgage, the creditor can present its claim for payment out of the general assets of the estate even though the claim is not yet due.

Creditors must file by the later of 6 months of the date of appointment of the personal representative or 4 months of personal notice.

If creditors fail to do this, the secured creditor is treated as a preferred debt and lien and can only look to security interest in satisfaction of the debt.

Creditors can foreclose on the mortgage, but there is no deficiency judgment.

Regarding creditor's claims in a guardianship, in addition to the rules above, there is mandatory personal notice to known creditors, either secured or unsecured.

Claims against an estate should be paid in the following order.

One: Funeral expenses and expenses of last illness up to \$15,000.

Two: Family allowance.

Three: Expenses of administration.

Four: Secured claims to extent covered by the lien if creditor filed a matured secured claim.

Five: Child support arrearages reduced to judgment

Six: State taxes.

Seven: Claims for repayment of Medicaid assistance paid by state.

Eight: Cost of confinement if decedent imprisoned in Texas prison.

And nine: All other claims, including funeral expenses, larger than \$15,000.

6) Set Aside in Insolvent Estate

The set aside is only temporary in a solvent estate, but the following assets may be set aside in insolvent estate.

Residence may qualify for homestead exemption.

And furnishings, auto, and cattle up to \$60,000 may qualify for exempt personal property. However, jewelry cannot exceed \$15,000.

7) Emergency Intervention for Payment

To pay funeral expenses and to protect personal property in rental unit, personal representative can seek emergency intervention no sooner than 3 days and no later than 90 days after deceased's death.

Foreclosure

In a dependent administration, a party must get court approval for foreclosure. On the other hand, a party does not need court approval in an independent administration for foreclosure.

1) Dependent Administration

The procedural steps for sale of real property in Dependent Administration are:

One: The personal representative should file an application for the sale describing the property, amount of outstanding claims, property on hand to pay creditors, and other facts showing need to sell for authorized purpose such as pay funeral expense, debts, and family allowance.

Two: Date for hearing will be set, and the notice should be given to all persons interested in the estate.

Three: Hearing will be held, at which court orders sale and specify terms.

Four: Property is sold, and the sale will be reported to Court within 30 days.

Five: After the notice is given to interested parties, the confirmation hearing is held and court affirms the sale.

And six: The personal representative then gives deed to purchaser.

2) Homestead Exemption

In urban areas, homestead exemption is limited to 10 acres without regard to the value of improvements, but this land must be used as a residence or business.

On the other hand, in rural areas, homestead exemption is limited to 200 acres for family and 100 acres for single individual.

3) Consequences of Property as Homestead

The consequences of a property qualifying as a homestead include:

Both spouses must join in any conveyance of this property.

This property is free from creditors claims with limited exceptions.

This property passes free of creditor's claims if owner is survived by the spouse, minor child, or unmarried adult child living with the decedent.

And for the minor child and spouse, they have the right to occupy homestead rent free for life, or for so long as he chooses. However, he cannot pass this right along when he dies. This is only regarding the minor child or spouse, not the unmarried adult child.

4) Exempt Creditors

The creditors for the following debt can keep their claim against a homestead.

Purchase money mortgage lien.

Taxes on the homestead itself.

Federal tax liens and loan to pay off federal tax lien.

Mechanics or materialman's lien for improvements, if the written contract is signed by husband and wife, entered before improvements made, and recorded loan to enable parties to distribute or divide homestead on divorce.

And equity loan for up to 80% of the value of the equity.

5) Homestead Occupant & Legal Owner

The legal owner must pay casualty insurance premiums and mortgage principal payments, while the occupant must pay real property taxes and mortgage interest payments.

Allowance

1) Allowance in Lieu

First, allowance in lieu of homestead is \$15,000 if the decedent did not own a homestead.

In contrast, allowance in lieu of exempt personal property is \$5,000 to the extent that items on exempt personal property list are not in the estate at death.

2) Family Allowance

Family Allowance is used to provide support for the surviving spouse and minor children during the period decedent's assets are in administration.

Family allowance comes off the top of the estate. They are over and above the amount inherited.

Also, Court does not take into account either the size of the community estate to determine if an allowance is allowed, or the size of the separate property in determining the size of the allowance.

Lastly, the allowance is charged against the entire community estate as a community obligation. This means it is charged half from each half of the community property.

Writing Work-shop.

Writing Workshop Part1

1) Background

The Texas State bar examination is administered twice a year on the last Tuesday, Wednesday, and Thursday of every February and July. The bar examination contains three sections, Multistate Performance Test section, given on Tuesday morning, the Procedure and Evidence Questions, given on Tuesday morning, the Multistate Bar Examination, shortened as MBE, given on Wednesday, and the Texas Essay Questions, given on Thursday. The Texas section includes the Procedure and Evidence Question and the Texas Essay Questions. Procedure and Evidence consists of 20 Civil Procedure and Evidence short answer questions and 20 Criminal Procedure and Evidence short answer questions. The Texas Essay includes 12 essay questions. While Tuesday only has the morning session, Wednesday and Thursday of the examination will consist of a morning session and an afternoon session with a lunch break in between.

On the Tuesday morning session, which begins at 9:00 A.M. and ends at 12:00 P.M., Board will give you 1 90-minute MPT question and 40 Procedure and Evidence questions in 90 minutes.

Which it means is that you have 90 minutes for a MPT question and 2 minutes 15 seconds for each of the 40 Procedure and Evidence questions.

On Thursday, there are a total of 6 essays in 3 hours in the morning and 6 essays in 3 hours in the afternoon. In conclusion, Texas section counts as 50% of the Texas bar exam, and MBE section counts as 50% of the Texas bar exam. To elaborate, Procedure and Evidence counts for 10% of the total Texas bar exam, and Texas Essay section counts for 40% of the total Texas bar exam.

Now that we understand the structure and importance of the Texas section, let's go over the subjects covered by the Texas section. Texas Board officially reported that 15 subjects will be tested on the bar exam. These subjects include Bankruptcy, Business Association, Consumer Rights, Family Law, Federal Civil Procedure, Income Estate and Gift Tax, Real Property, Oil and Gas, Texas Civil Procedure, Texas Criminal Procedure, Texas Evidence, Trusts and Guardianships, UCC3 Commercial Paper, UCC9 Secured Transaction, and Wills and Administration.

To make your life easier, I have categorized these subjects into 3 levels, based on the type of questions they appear on the Texas section of the bar exam. As Texas has 12 essays with 40 short answers questions, you should plan on studying all of the subjects.

The first category of subjects is the short answers subjects that will always be tested, and they are Texas Civil Procedure, Texas Criminal Procedure, and Evidence.

The next category of subjects often appears as the main topics in an essay. They are Torts, Contracts, Real Property, Constitutional Law, Business Associations, Trusts and Guardianships, Wills and Administration, Family Law, UCC3 and UCC9, and Consumer Rights.

The third category of subjects often appears as the cross-over topics in an essay. They are Bankruptcy and Income Estate and Gift Tax.

2) Testing

Essay questions are designed to test your knowledge of both general law and Texas law. When Texas law varies from general law, the question should be answered in accordance with Texas law.

Therefore, to prepare for the Texas portion of the bar exam, you should study the substantive outlines, practice outlining essays, and check your answers.

The reason that outlining your essays is so important is that issue spotting, application of Texas law, and strength of your argument are the 3 points that a bar examiner bases his grading on.

In addition, organizational skills will facilitate the bar examiners' grading and thus is a pretty important factor.

The Texas bar examiner specifically calls for a clear, concise expository style with attention to organization and conformity with grammatical rules. Also, if the question calls for a specific conclusion or result, the conclusion should clearly appear at the end of the answer, stated concisely without undue elaboration or equivocation.

In addition to essays, the Texas short answers section has 40 questions. Civil Procedure and Evidence has 20 questions, and Criminal Procedure and Evidence has 20 questions. Each question should be answered with less than 3 complete sentences. Each short answer should start with a conclusion to the question asked and a summary of the general rule that will back up the answer. The general rule should then be followed by the application of the fact pattern to the rule. In short answer questions, there is no need to identify issues because the question will do that for you.

3) Essay Writing Basic Techniques

Remember: You have 30 minutes for each essay.

First, take a minute to read the call of the question. Doing so will allow you to know what issue and fact you should be focusing on.

Then, spend the first 10 minutes outlining the issues in the essay and framing your answer.

Finally, spend the remaining 20 minutes writing your answer.

IRAC is the most common way and the easiest way to approach each issue:

Issue

Rule

Analysis

Conclusion

After stating each issue presented by the facts, state the applicable rule of law. Then, analyze each element of the rule of law by stating the fact that apply or the absence of any fact that would make the rule applicable. Finally, state your conclusion.

In addition to outlining your answer before you fully answer the questions with IRAC, write concise sentences. Run-ons, fragments, and dangling participles make it difficult for the grader. Graders should not have to search for the answer.

Remember: You want the grader to like you.

Also, write clearly. If the grader cannot read your paper, the grader cannot grade your paper. Using print rather than script writing, and double spacing may make it easier for the grader. Another point is not to argue both sides unless the facts warrant so. Take a position and stick to it. Follow through with the best support for the argument based upon your knowledge of

the applicable law. Being indecisive makes the bar examiners think you do not know the law at all.

Most importantly, only deal with the issue presented.

Example: If you are dealing with one particular hearsay exception, you should not list all the hearsay exceptions. It is not necessary to tell the bar examiners what does not apply to the facts presented.

While you should definitely underline the buzz words or the issues, do not overemphasize so many words that the effect is lost.

To keep the answer organized, always complete the discussion of one issue before moving to another. Do not combine two or three issues into one paragraph and one thought. Discussion of each issue should be viewed as a "mini essay" and should be able to stand by itself.

Regarding analysis, you should develop your analysis fully: A mere conclusion without legal reasoning and fact application is worthless. For each element of each rule of law, you must state how a fact applies or does not apply.

Example: There was an entering because he put his hand through the window. It is a dwelling because people live there. The defendant was armed because he had a gun. Do not stop at "there was an entering or it is a dwelling".

Do not interject your personal opinion as to how a court should rule based upon your sense of "fairness, justice, and decency" rather than on the applicable legal principles.

If a statute is applicable to your answer, you should mention the broad name of the statute such as UCC 2 for Sales of Contract and UCC 3 for commercial paper. However, do not mention statute numbers or case names unless they are extremely significant and recognizable such as Miranda warning in criminal procedure.

Writing Workshop Part 2

4) Essay Writing Tips from Bar Examiners

To check if you have spotted all issues, you should find at least one issue in each paragraph.

Tips on how to spot those issues:

When you are reading a question, look for key words in fact.

For Example, seeing dates may suggest a timeliness issue. When there are several parties, look at their rights, liabilities and remedies. When there are several states, look for issue of conflict of laws or diversity.

Numbers are usually important.

For Example, dollar amounts are important for damages and for calculating Statute of Frauds requirements in Contracts.

Number of days obviously point to timeliness issues. Ages of parties usually direct to infancy issues.

The next key word is "said" or "told," which is a big buzz word for writing requirement in Statutes of Frauds.

Furthermore, negative words such as no, not, or without usually raise a legal issue.

For Example, without someone's consent, without notice, or without writing all raise significant issues in different subjects.

List of legally significant words: Every time you see it, you should define it and find a connection between these words and the issues they raise.

Merchant: Has special rules in UCC 2, Contracts and Sales, and merchants also raise issues in Torts strict liability.

Agent: Regardless of the subject in question, the word agent raises fiduciary duties issues.

Demand: When you see demand, there are usually 3 possible issues.

- 1) Is there a right to demand?
- 2) Was the demand timely?
- 3) Was demand in the proper form?

On the same note, represent is a key word that raises the similar issues. Is there a right to represent? Was the representation in a proper form? Did it constitute fraud?

Waived: When you see a party waived something, it raises the question if it is effectively waived. However, do not discuss if the question clearly states that it is effectively waived.

Good faith: It may be relevant for certain status such as bona fide purchaser, or it may be irrelevant if the party is strictly liable.

Unenforceable: Brings out the issue of finding grounds for rendering contract enforceable such as Statute of limitations, Statute of Frauds, or lack of consideration.

Look for any quoted language, usually you are expected to apply that language.

Key words should help you identify issues when you are reading the questions.

Another tip that will help you identify the right issues is that you should identify the legal status of each party and the relationships between each party. These labels will trigger applicable rules of law.

For Example, identify parties as a merchant or non-merchant will trigger different applicable rules.

Similarly, undisclosed principle will trigger different rules from a disclosed principle, and a good faith purchaser for value will get better protection from law than purchaser without good faith.

Also, as long as a party is identified a fiduciary of another, he owes certain duties. This fiduciary relationship exists in agents, corporate officers, partners, trustee, and etc.

That concludes the tip regarding identifying legal status of each party.

The next tip offered by bar examiners that may help you identify the right issues is identify the key facts in an essay that have effects on multiple parties with distinguishing ways between them.

For Example, when one party is adult and the other infant, issues may raise from that key fact.

Other Examples:

Merchant & non-merchant

Fiduciary & non-fiduciary

Trespasser vs. invitee in a property trespass

Secured creditor vs. unsecured creditor

Objecting party vs. non-objecting party

Party with privity vs. no privity relationship

Party with domiciliary vss non-domiciliary relationship

Party that gave consideration vs. a party that did not give consideration

Deceased party vs. living party

Distribute vs. non-distributee in Wills

Party that is solvent vs. one that is insolvent

That concludes the tips on how to spot issues. While spotting issues is one of the most important skills you have to obtain to pass the bar exam, avoiding discussing non-issues is just as important.

The good news is that non-issues are easy to spot because bar examiners will tell you that it is not at issue.

For Example, the question will state that the case is duly commenced, which means that the commencement is not at issue. Or if the question states that something is timely or validly executed, then that something is not at issue. For Example, a timely objection or a validly executed will is not at issue.

Writing techniques that may get you higher grades:

First, refer to statutes by name in regard to issues. For Example, mention that UCC 2 applies when the issue is regarding sale of goods or BCL when issue is regarding Corporations.

Second, when an exception to a general rule applies, first state the general rule, then how the issue would be resolved under that rule, then use "however" to note any exception that applies and then apply the exception.

If you conclude that no exceptions apply, then state that "none of the established exceptions to this rule apply."

Third, always define key legal terms in the essay. Have a summary statement that you will always use on the exam.

For Example, merchant is a party who deals in goods of a particular kind, goods is moveable personal property, laches means an unreasonable delay when seeking the equitable remedy of specific performance, and so on.

Fourth, always mention whether a particular remedy is a legal or equitable. Legal remedies involve money and equitable usually does not.

Also, when you are calculating the remedies, complete the math, then state the answer in dollars and not percentage. This applies to damages, estate distributions, and etc.

Fifth, when discussing a party's rights and liabilities, always state the conditions precedent that must be established first.

There are four things to know when discussing a party's right and liabilities.

One: When you state an applicable rule of law, always state all of the elements of the rule, then say how they are met or not met.

Two: When 2 or more parties are liable, always state how they are liable, either jointly and severally or just jointly.

Three: After stating a rule of law, always add: "In the absence of any contrary agreement or provision." This is for all default rules.

And four: Always give the reason for each and every legal conclusion immediately after stating it with the word "because." For Example, Mike is a merchant because he is a dealer of goods of a particular kind.

Steve is an infant because he was under 18 at the time of the commission of the crime.

For More Examples and detailed explanation of each key word and tips, please refer to our writing workshop outline.

Most importantly, please practice these tips every time you write out a full exam.

Minor tips that may come in handy:

First, make part headings and make separate headings if you are applying the same rules to different parties.

Second, leave room for writing at the end of each part in case you want to make unexpected additions.

Third, to add something and assure that the paragraph still flows, use the all-you-can-add phrase: "It should be noted that..."

Fourth, always cover yourself if you conclude that a party has no rights or remedies by stating that assuming the Statutes of Frauds did not bar the claim, the Plaintiff would have the following rights and remedies. And then state the rights and remedies briefly without details.

Finally, when you are running out of time, skim through the essay and answer all parts to get most points, since they are not equally weighted.

Use this method:

Invert the material facts into a question

Answer the question with a yes or no

And state the applicable rule of law.

Do this three-step answer for at least 2 issues in each paragraph.

FIN.
